Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

HIGHWAY J CITIZENS GROUP, U.A., et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A lawsuit under the National Environmental Policy Act (NEPA), alleging that a government project would cause specific environmental harm, included a claim that certain government agencies had unlawfully segmented that project from an adjacent one to avoid preparation of an environmental impact statement on the effects of the first project. The lower courts rejected the segmentation claim and held that the two projects were properly separate. In a later suit, the same plaintiff challenged the adjacent project under NEPA, alleging environmental harm of an entirely different nature and in a different location.

The questions presented are:

I. Where a NEPA action challenges one government project and alludes to another project only via an unsuccessful claim that certain government agencies unlawfully segmented the two, does claim preclusion bar a subsequent NEPA action challenging the second project?

II. Does claim preclusion bar a NEPA claim seeking preparation of a supplemental environmental impact statement based on facts that did not exist until after disposition of the claimant's previous NEPA lawsuit concerning that project?

III. Should a federal court of appeals assign the same three-judge panel to appeals in separate, successive lawsuits, where the sole issue in the second appeal is whether disposition of the first lawsuit barred the claims made in the second one?

PARTIES TO THE PROCEEDING

Petitioner Highway J Citizens Group ("Citizens") is an unincorporated association of over 15,000 members, consisting principally of homeowners, family farmers, and small business owners, in the State of Wisconsin. Citizens was an appellant in the U.S. Court of Appeals for the Seventh Circuit and a plaintiff in the U.S. District Court for the Eastern District of Wisconsin.

Petitioner Waukesha County Environmental Action League ("WEAL") is a Wisconsin non-stock corporation of approximately 100 members. WEAL has no parent corporation, no stock, and no publicly held company owns any portion of it. WEAL was an appellant in the U.S. Court of Appeals for the Seventh Circuit and a plaintiff in the U.S. District Court for the Eastern District of Wisconsin.

The respondents are the United States Department of Transportation ("USDOT"); Maria Cino, in her official capacity as Secretary of USDOT; the Federal Highway Administration ("FHWA"); Mary Peters, in her official capacity as Administrator of FHWA; the United States Army Corp of Engineers ("COE"); Michael F. Pfenning, in his official capacity as District Engineer of the COE; and Frank Busalacchi, in his official capacity as Secretary of the State of Wisconsin Department of Transportation ("WisDOT"). All respondents were appellees in the U.S. Court of Appeals for the Seventh Circuit and defendants in the U.S. District Court for the Eastern District of Wisconsin.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. The Court Should Grant this Petition to Address Conflict Among the Circuit Courts Regarding the Test for Determination of the "Identical Claims" Prong of Claim Preclusion Analysis. 5

A. The circuit courts have applied several different standards to determine whether claims are identical under the claim preclusion doctrine. 5

B. Choice of the proper test for identity of claims is determinative of the claim preclusion issue in the case at bar. 10

II. The Court Should Grant this Petition to Address a Conflict Among the Circuit Courts Regarding the Effect on Claim Preclusion Analysis of Facts that Did Not Exist During the Pendency, or in Any Event at the Inception, of the Previous Action. 19

III. The Court Should Grant this Petition in the Exercise of Its Supervisory Power to Consider the Circumstances in which a Court of Appeals May Depart from Random Assignment of Panel Judges. 25

CONCLUSION 30

APPENDIX 31

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U.S. 90 (1980) 5

American Cyanamid Co. v. Capuano,
381 F.3d 6 (1st Cir. 2004) 21

Andersen v. Chrysler Corp.,
99 F.3d 846 (7th Cir. 1996).....6,9,12

Blair v. City of Greenville,
649 F.2d 365 (5th Cir. 1981).....21

Blair v. Equifax Check Services, Inc.,
181 F.3d 832 (7th Cir. 1999) 26

Brokaw v. Weaver, 305 F.3d 660 (7th Cir. 2002) 26

Brown v. Vance, 637 F.2d 272 (5th Cir. 1981) 25

Brzostowski v. Laidlaw Waste Systems, Inc.,
49 F.3d 337 (7th Cir. 1995).....11

Central Delta Water Agency v. United States,
306 F.3d 938, 953 (9th Cir. 2002) 10

Colonial Penn Life Ins. Co. v. Hallmark Ins.
Admin., Inc., 31 F.3d 445 (7th Cir. 1994).....11

Costantini v. Trans World Airlines,
681 F.2d 1199 (9th Cir. 1982).....10

Dore v. Kleppe, 522 F.2d 1369 (5th Cir. 1975).....19

Drake v. F.A.A., 291 F.3d 59 (D.C. Cir. 2002).....24

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *aff'd* 596 U.S. 306 (2003) 28

Havercombe v. Dept. of Educ. of Com. of P.R., 250 F.3d 1 (1st Cir. 2001) 24

Headwaters, Inc. v. U.S. Forest Service, 399 F.3d 1047 (9th Cir. 2005) 6

Hells Canyon Preservation Coun. v. U.S. Forest Service, 403 F.3d 683 (9th Cir. 2005) 6,10

Hermann v. Cencom Assocs., Inc., 999 F.2d 223 (7th Cir. 1993) 6,7,8,11,12

Highway J Citizens Group v. Mineta ("Citizens I"), 349 F.3d 938 (7th Cir. 2003), *cert. denied*, 541 U.S. 974 (2004) 3,14,15,17,18

Highway J Citizens Group v. U.S. Dept. of Transp. ("Citizens II"), 456 F.3d 734 (7th Cir. 2006) 4,6,11

In re Atlanta Retail, Inc., 456 F.3d 1277 (11th Cir. 2006) 16

Lawler v. National Screen Serv. Corp., 349 U.S. 322 (1955) 21

Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3d Cir. 1991) 8

Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992) 24

Marsh v. Oregon Natural Resources Coun., 490 U.S. 360 (1989) 22

Matter of Energy Co-op., Inc.,
814 F.2d 1226 (7th Cir. 1987) 9

McDermott, Inc. v. Wheelabrator-Frye, Inc.,
649 F.2d 489 (7th Cir. 1980) 26

Montana v. United States, 440 U.S. 147 (1979) 10

Nevada v. United States, 463 U.S. 110 (1983) 7,9

Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers, 440 F.3d 1038 (8th Cir. 2006) 21

Sanders Confectionery Prods. v. Heller Fin., Inc.,
973 F.2d 474 (6th Cir. 1992) 9

S.E.C. v. First Jersey Securities, Inc., 101 F.3d 1450 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997) 23

Stone v. Dept. of Aviation,
453 F.3d 1271 (10th Cir. 2006) 24

Sure-Snap Corp. v. State St. Bank and Trust Co.,
948 F.2d 869 (2d Cir. 1991) 9

The New River Valley Greens v. U.S. D.O.T.,
161 F.3d 3, 1998 WL 633959 (4th Cir. 1998) 21

United States v. Athlone Indus., Inc.,
746 F.2d 977 (3d Cir. 1984) 6

Statutes and Regulations

United States Code:

5 U.S.C. § 702 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1361 4

28 U.S.C. § 1367 4

28 U.S.C. § 2254 25

28 U.S.C. § 2255 25

Fed.R.Civ.P. 15(c), 28 U.S.C. 24

42 U.S.C. § 4332 1

Code of Federal Regulations:

23 C.F.R. § 771.111(f) 2,3,18

40 C.F.R. § 1502.4(a) 1,17

40 C.F.R. § 1502.9(c) 2

40 C.F.R. § 1502.9(c)(1)(ii) 20

40 C.F.R. § 1508.25(a)(1) 1,17

Circuit Rule 36(c), U.S. Court of Appeals
for the Fourth Circuit 22

Seventh Circuit Internal Operating Procedures:

Preamble 26
6 25
6(b) 2,25,26,28,29
6(d) 25

Other Authorities

J. Robert Brown, Jr. and Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX.L.REV. 1037 (2000) 26,27

Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) 27

Daniel R. Mandelker, *NEPA Law and Litigation* (2d ed. 2006)

§ 9:11.....17
§§ 9:11 – 9:17 17

18 *Moore's Federal Practice 3d* (2006):

§ 131.20[1] 6
§ 131.20[2] 6
§ 131.20[3] 7,8,11
§ 131.20[4] 8,9,10
§ 131.22[1] 21

Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (2003) 27,28

Restatement of Judgments § 61 (1942).....9

Restatement (Second) of Judgments (1982):

§ 24.....7
§ 24, cmt. b 7,9

Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and in support of their petition state as follows:

OPINIONS BELOW

The court of appeals opinion (App. 1-22) is reported at 456 F.3d 734, 36 Envtl. L. Rep. 20,152 (7th Cir. 2006). That court's order denying the petition for rehearing (App. 177) is unreported.

The opinion of the United States District Court for the Eastern District of Wisconsin denying the petitioners' motion for a preliminary injunction (App. 23-61) issued April 27, 2005 and is reported at 2005 WL 1076071. The opinion of that district court denying the petitioners' motion for an injunction pending appeal issued June 16, 2005 and is reported at 2005 WL 1421489.

JURISDICTION

The judgment of the court of appeals (App. 1-22), of which the petitioners seek review, was entered on August 2, 2006. The petitioners filed a timely petition for rehearing, and an order denying that petition was entered October 12, 2006. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant section of NEPA, 42 U.S.C. § 4332, is reproduced at App. 178-81. Council on Environmental Quality (CEQ) regulations concerning segmentation, 40 C.F.R. §§ 1502.4(a) and 1508.25(a)(1), are reproduced at

App. 181-82. An FWHA regulation concerning segmentation, 23 C.F.R. § 771.111(f), is reproduced at App. 182-83. A CEQ regulation on preparation of a supplemental environmental impact statement (SEIS), 40 C.F.R. § 1502.9(c), is reproduced at App. 183-84. A Seventh Circuit Internal Operating Procedure on panel assignment, IOP 6(b), is reproduced at App. 184-85.

STATEMENT OF THE CASE

This case requires discussion of two construction projects on State Highway 164 in Wisconsin: the "Ackerville Bridge Project" and the "Highway 164 Project." App. 3-7. The "Ackerville Bridge Project" primarily involves the construction of two overpass structures on approximately 1.3 miles of the highway in Washington County. App. 5-6, 65-66, 188-89. The "Highway 164 Project" involves the expansion of an 18-mile segment of the highway, principally in Waukesha County but also in Washington County, from two lanes to four. App. 4-5, 85-86, 204.[1] The projects cover adjacent or nearly adjacent, but not overlapping, segments of the highway. App. 5-6, 86, 189.[2] They were assigned separate government project numbers, and the environmental evaluations for each were separate and proceeded on different time lines. App. 4-7, 64-85, 218-19, 229.

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[1] When initially constructed, the highway was named County Highway J. It was renamed State Highway 164 under jurisdictional transfer agreements between WisDOT and local governments. App. 4 n.4; App. 189.

[2] The northern terminus of the Highway 164 project has been variously described so as either to abut the southern terminus of the Ackerville Bridge Project, or to leave a small gap between those two points. App. 190.

Citizens sued various federal and state agencies and officers in federal district court in July 2002,[3] claiming that construction of the Ackerville Bridge Project risked disturbing an underground "contamination plume" containing arsenic and trichloroethylene, which was migrating towards the site. App. 63, 190-92. Citizens' complaint consisted of three counts. First, it alleged that the environmental assessment for the project failed to examine the risks associated with the contamination plume, and sought to enjoin continued construction of the overpasses and to require filling of the drilled bridge piling holes with concrete pending another environmental impact study, which it requested the court to order. App. 7-8, 193-96. Second, Citizens contended that the agencies had failed to consider reasonable alternatives to building the Ackerville bridges. App. 8, 196-98. Lastly, Citizens included a claim that the agencies had improperly segmented the Ackerville Bridge Project from the Highway 164 Project to avoid preparation of an EIS concerning the Ackerville Bridge Project. App. 8, 106-07, 198.

The district court ruled against Citizens on the merits (App. 111-76), and the court of appeals, per the same panel later assigned to the case at bar, affirmed. *Highway J Citizens Group v. Mineta ("Citizens I")*, 349 F.3d 938 (7th Cir. 2003), *cert. denied*, 541 U.S. 974 (2004) (App. 62-110). In addressing Citizens' segmentation claim, the court of appeals held that the agencies had appropriately analyzed the relevant factors under 23 C.F.R. § 771.111(f) (App. 182-83), the FHWA regulation concerning project definition. *Id.* at 963 (App. 108-09).

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[3] The court of appeals' decision in *Citizens II* at one point erroneously states that this filing occurred in July *2003*. App. 7.

The court noted that the most important of those factors in the case before it was that the separate projects have independent utility. *Id.* (App. 109). The agencies had determined—properly according to the court—that independent utility existed because the focus of the Ackerville Bridge Project was transportation safety, while the focus of the Highway 164 Project was highway expansion, and neither required construction of any other projects to be usable. *Id.* (App. 109).

In February 2005, Citizens and WEAL (collectively, "Citizens") filed the current action invoking the district court's jurisdiction under 5 U.S.C. § 702, and 28 U.S.C. §§ 1331, 1361, and 1367. App. 212. In that action, Citizens claimed that the Highway 164 Project would adversely affect public health by increasing motor vehicle use, traffic congestion, and emission of air pollutants; would increase conversion of open lands to developed uses; and would destroy wetlands and thereby increase flooding and adversely affect the aquatic ecosystem. App. 221-28. Citizens also claimed that the agencies failed to hold adequate public hearings on the proposed EIS for the Highway 164 Project. App. 216, 237. Finally, Citizens asserted that new information concerning the project's adverse effects on wetlands, air quality, noise, land use, and highway safety became available after final approval of the EIS, which required preparation of an SEIS. App. 76-77, 234-35.

The district court denied Citizens' motion for a preliminary injunction to stop work on the project. App. 23-61. That court ruled that Citizens had not demonstrated a reasonable likelihood of success on the merits because their claims probably were barred by claim preclusion. App. 59. The court of appeals affirmed, *Highway J Citizens Group v. U.S. Dept. of Transp.* ("*Citizens*

II), 456 F.3d 734 (7th Cir. 2006) (App. 1-22), ruling that the claim preclusion doctrine barred Citizens' challenge to the Highway 164 expansion project. *Id.* at 744 (App. 21).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant this Petition to Address Conflict Among the Circuit Courts Regarding the Test for Determination of the "Identical Claims" Prong of Claim Preclusion Analysis.

This case presents the Court with an opportunity to address and, hopefully, resolve long-standing intercircuit conflict, as well as intracircuit confusion, as to the proper standard for determining whether two claims are identical under the claim preclusion doctrine (see Part A below). The disposition of the segmentation claim in *Citizens I* is helpful in addressing that conflict because there is substantial symmetry between the justifications for government segmentation of environmentally impactful projects and for permitting a litigant to split its claims (*see infra* pp.17-19). Moreover, such segmentation claims are common in NEPA litigation (*see infra*, p.17).

A. The circuit courts have applied several different standards to determine whether claims are identical under the claim preclusion doctrine.

Claim preclusion, historically known as res judicata, precludes parties or those in privity with them from relitigating issues that were or could have been raised in a previous action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The three requirements for claim preclusion under federal law are (1) identity of claims, (2) final judg-

ment on the merits in the previous action, and (3) privity between parties in the two actions. *Hells Canyon Preservation Coun. v. U.S. Forest Service*, 403 F.2d 683, 686 (9th Cir. 2005) (quoting *Headwaters, Inc. v. U.S. Forest Service*, 399 F.2d 1047, 1051-52 (9th Cir. 2005) (citation and internal quotation marks omitted)). In the case at bar, only the "identity of claims" prong is in issue. *Citizens II*, 456 F.3d at 741 (App. 14-15).

There is "no test of universal applicability" for identity of claims. 18 *Moore's Federal Practice 3d*, § 131.20[1] (2006). Instead, "[c]ourts have developed various approaches for dealing with this gray area, but courts still face frustrating and difficult conceptual obstacles in applying the claim preclusion doctrine in some cases." *Id. See United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984) ("This court has on more than one occasion grappled with the difficult question of identity of causes of action for purposes of claim preclusion ... [T]he term has been given varied treatment depending upon the facts of each case and the inquiry is often fraught with conceptual difficulties."); *Hermann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 226 (7th Cir. 1993) (standard "is not as clear as it might be ..."); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 852 (7th Cir. 1996) ("We have previously observed the difficulty of articulating an 'operational legal standard' for identifying situations in which two causes of action are so closely related that they must be brought together, lest the first suit bar the second as res judicata" (quoting *Hermann*, 999 F.2d at 226)).

Most federal courts employ, in whole or in part, the "transactional" test described in *Restatement (Second) of Judgments* (1982). *Moore*, *supra*, § 131.20[2]. The transactional test is:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series" are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second), supra, § 24. The comments accompanying that section indicate that the expression "transaction, or series of connected transactions," is "not capable of a mathematically precise definition," but rather "invokes a pragmatic standard to be applied with attention to the facts of the cases . . . . In general, the expression connotes a natural grouping or common nucleus of operative facts." *Id.*, cmt. b. In *Nevada v. United States*, 463 U.S. 110, 131 and n.12 (1983), this Court quoted the "transactional" approach but found it unnecessary to choose between that test and several other historical tests for identity of claims.

Moore observes that the "Seventh Circuit has rejected the Restatement approach," in favor of a rule that "claims will be considered the same if they are based on the same or nearly the same factual allegations." *Moore, supra,* § 131.20[3] (citing *Hermann,* 999

F.2d at 226). In *Hermann*, Judge Posner, writing for the court, criticized the Second Restatement's "pragmatic" approach as a font of uncertain and unpredictable results:

> We're all for pragmatism, but pragmatism is not an operational legal standard. Litigants and their lawyers are entitled to clearer guidance in an area where a false step can result in the forfeiture of valuable legal rights than generalities about practicality, convenience, similarities, and expectations can furnish . . . . Where certainty is at a premium, sound lawmaking requires the setting forth of clear and definite criteria rather than a general directive to decide each case in the manner that will maximize the attainment of the law's objectives. The latter approach, carried to an extreme, would reduce all law to an admonition to do what's right.

999 F.2d at 226. While no other circuit has explicitly adopted the Seventh Circuit's "factual allegations" test, several have used it without comment. *Moore, supra*, §131.20[3] and n.17 (collecting cases).

Other circuit courts, having embraced neither the factual allegations test nor the transactional test in its entirety, have followed "a hybrid approach which incorporates elements of the various historical tests." *Moore, supra*, § 131.20[4]. For example, the Third Circuit has enunciated a standard based on "similarity of the acts complained of, the material facts alleged as the basis for the suit, and whether the witnesses and documentation necessary to prove the allegations in the actions would be the same." *Id.* (citing *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991)). The Sixth Circuit has

posited the test as "an identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Sanders Confectionery Prods. v. Heller Fin., Inc.*, 973 F.2d 474, 484 (6th Cir. 1992) (quoted in *Moore, supra*, § 131.20[4]).

The First Restatement adopted the principle that "causes of action were to be deemed the same 'if the evidence needed to sustain the second action would have sustained the first action.'" *Nevada v. United States,* 463 U.S. at 131 n.12 (quoting *Restatement of Judgments* § 61 (1942)). The Second Restatement, without explanation, endorses the "same evidence" test only as a positive, not a negative, test for claim identity in the larger context of the transactional standard. *Restatement (Second), supra*, § 24, cmt. b. The Seventh Circuit, in contradictory fashion, has both rejected and embraced the "same evidence" test. *Matter of Energy Co-op., Inc.*, 814 F.2d 1226, 1230-31 (7th Cir. 1987) (rejecting test); *Andersen*, 99 F.3d at 852 (7th Cir. 1996) (embracing test as corollary of factual allegations test).

Still other circuits "have welded the factors involved in the [Second] Restatement approach onto one or more of the historical tests." *Moore, supra,* § 131.20[4]. The Second Circuit has indicated that it will use the transactional test but will also consider "whether an independent judgment in a separate proceeding would impair or destroy rights or interests established by the judgment entered in the first action." *Sure-Snap Corp. v. State St. Bank and Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991) (quoted in *Moore, supra*, § 131.20[4]). That test reflects the fact that the objectives of claim preclusion include not only conserving judicial resources and protecting parties from the expense and vexation of multiple lawsuits, but also fostering reliance on judicial

action by minimizing the possibility of inconsistent decisions. *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

> In the Ninth Circuit, identity of claims turns on:
>
> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. The last of these criteria is the most important.

Hells Canyon, 403 F.3d at 690 (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (citation and internal quotation marks omitted)). *See also Moore, supra*, § 131.20[4] and n.26 (collecting earlier Ninth Circuit cases). "[W]hen considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes," a court "must narrowly construe the scope of that earlier action." *Central Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002).

B. Choice of the proper test for identity of claims is determinative of the claim preclusion issue in the case at bar.

While the court of appeals in the instant case cited neither *Hermann* nor the Second Restatement, it applied the factual allegations test to find identity of claims. The court stated: "A claim has 'identity' with a previously litigated matter if it emerges from the same

core of operative facts as the earlier action.'" 456 F.3d at 741 (App. 15) (quoting *Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338-39 (7th Cir. 1995)). *Brzostowski* in turn cites *Colonial Penn Life Ins. Co. v. Hallmark Ins. Admin., Inc.*, 31 F.3d 445, 447 (7th Cir. 1994), for that proposition, and in its next sentence, reduces that generality to the factual allegations test, citing *Colonial Penn* and *Hermann*: "Two claims are one for purposes of res judicata if they are based on the same, or nearly the same, factual allegations." *Brzostowski*, 49 F.3d at 339 (*citing Colonial Penn*, 31 F.3d at 447; and *Hermann*, 999 F.2d at 226).

Indeed, the court of appeals in the case at bar clearly and entirely limited its analysis to comparison of the allegations of the complaint in *Citizens I* with those of the complaint in *Citizens II*. 456 F.3d at 742-43 (App. 16-19). Moreover, the analysis stopped at the identification of a nexus between those two complaints—namely, the EIS prepared for the Highway 164 Project. *Id.* The court did not address the pragmatic concerns that the Second Restatement describes, such as whether the facts in the two cases are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether their treatment as such conformed to the parties' expectations. Nor did it address the factors in standards for identity of claims that other circuits have enunciated, such as whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action, or whether substantially the same evidence would be presented in the two actions.

While the factual allegations standard is on its face "straightforward" and "easy to administer" compared to the transactional test (*Moore, supra*, § 131.20[3]), the

flip side is that its monolithic nature entails the danger of oversimplification. The test begs the following questions:

- At what level of specificity should the court examine the factual allegations of each case? In all but the most extreme cases, this parameter affects the court's perception of the amount of factual overlap between the cases. *See Andersen*, 99 F.3d at 852-53 (counseling that courts should examine facts at "sufficient" level of specificity but providing no yardstick for determining appropriate level of specificity).

- Should the court measure only quantitative factual overlap, or also qualitative overlap—i.e., should it assess the relative importance of common facts to each claim? *See id.* at 855 (in two suits challenging severance benefits and third challenging pension benefits under one overall plan, plaintiffs considered amount of pension as "exogenous factor" in first two suits).

- How much factual overlap (however measured) is sufficient to find identity of claims?

Judge Posner, writing for the Seventh Circuit in *Hermann*, frankly recognized the limitations of the factual allegations test: "The difficult intermediate cases—where there is substantial factual overlap between the two claims, but not . . . a complete or nearly complete lack of overlap—can be left for the future. Our formulation is helpful only in the identification and disposition of cases lying at the extremes . . . ." 999 F.2d at 227. There is no better illustration of those limitations than the case at bar.

Application of the transactional test or a hybrid test to the instant case should have changed its result. As the court of appeals in the case at bar recognized (456 F.2d at 741 (App. 15-16)), the two suits focus on separate construction projects. Moreover, each project presents different environmental problems. The *Citizens I* complaint alleged that the Ackerville Bridge Project would accelerate and aggravate groundwater contamination in the area of its construction, and that the agencies inadequately addressed that problem in approving that project in April 2000. The current suit has nothing to do with groundwater contamination but, rather, addresses entirely different environmental problems—air pollution, undesirable development, and destruction of wetlands—from the widening of Highway 164 in a separate and much more extensive area. That suit alleges that the agencies inadequately addressed those problems in approving that project in March 2002.

Because the challenges to the Ackerville Bridge Project and the Highway 164 Project involve distinct (i.e., non-overlapping) locations, quite different and unrelated environmental problems, and markedly divergent timelines, their facts—i.e., the challenged agency actions in each case—do not feature a close or significant relation in time, space, or origin. It ought also to be apparent that they do not form a convenient trial unit. And in no way are the facts Citizens had to prove in those two suits substantially similar.

An additional aspect of the differing timelines of the two projects demonstrates that the court challenges to them do not form a convenient trial unit. The court of appeals stressed that Citizens could have challenged the Highway 164 Project per se in its first suit, since

the Record of Decision (final approval) of that project issued March 6, 2002, some four months before Citizens filed that suit. 456 F.3d at 744 (App. 21); *see also id.* at 736-37 and n.6 (App. 5). This observation, however, establishes only a precondition for application of claim preclusion. *See* Part II, *infra.* In practical fact, four months is scant time to assess something as detailed, technical, and voluminous as the Highway 164 Project EIS and to make a reasoned, deliberate decision whether to mount a court challenge to the project. On the other hand, challenge to the Ackerville Bridge Project could not wait: in July 2002, the agencies had "begun to sink piles for construction," which Citizens alleged would "allow contaminants below the surface to mix with surface groundwater . . . ." App. 192-93. It is counterproductive to judicial economy, and therefore to the doctrine of claim preclusion, to push a plaintiff into a hasty decision to bring claims that, upon more deliberate reflection, it might decide not to bring.

The Ackerville Bridge Project and the Highway 164 Project do not present a "natural grouping" of operative facts that the transactional test requires for identity of claims. The sole nexus between the two projects is the segmentation claim in *Citizens I*, as the court of appeals recognized in that case: "Citizens' focus in this case is Project #2748-01-00, the Ackerville Bridge Project. Project #2748-01-01, the County J/Highway 164 Project, is relevant to this litigation only because Citizens believes that it was improperly segmented from the Ackerville Bridge Project." 349 F.2d at 942 (App. 65). In addition, Citizens alleged that the segmentation was improper not for any reason touching on the environmental issues concerning the Highway 164 Project itself but, rather, because segmentation enabled the EIS for that project

to avoid "address[ing] the environmental issues raised by the presence of the contaminate plume." App. 198.

Those facts, to which the court of appeals did not allude in the case at bar, are crucial to the claim preclusion analysis. They demonstrate indisputably that the Highway 164 Project entered into *Citizens I* only in relation to the underlying facts unique to *Citizens I* and the Ackerville Bridge Project—facts uninvolved in *Citizens II*—namely, the contamination of groundwater with arsenic and trichloroethylene. The Highway 164 Project per se, like the pension plan in the two predecessor suits in *Andersen*, was an exogenous factor, in that Citizens' contentions did not implicate the environmental effects of that project. Both quantitatively and qualitatively, then, the factual overlap between Citizens' two suits is undeniably minimal. Indeed, that conclusion is irresistible not only from a reading of the complaints in *Citizens I* (App. 186-202) and the instant case (App. 203-43), but also from a reading of the district court (App. 111-76) and court of appeals' decisions in *Citizens I* (App. 62-110).

For the same reason, reaching the merits in the instant case could not conceivably impair the rights established by the judgment in *Citizens I*. That judgment did not address the adequacy of the EIS for the Highway 164 Project in relation to that project. Rather, the *Citizens I* judgment sustained the Environmental Assessment and Finding of No Significant Impact for the Ackerville Bridge Project. 349 F.3d at 962-63 (App. 108-09). While that judgment may entail the corollary that the Highway 164 EIS was not deficient for failing to address the contamination plume problem implicated in the Ackerville Bridge Project, a ruling on the merits of the case at bar could find that EIS deficient in its as-

sessment of the different environmental problems implicated in the Highway 164 Project, and such a ruling would be completely consistent with the *Citizens I* judgment and leave it completely intact.

The court of appeals' focus on the EIS document itself as the factual nexus between the two cases demonstrates the mechanistic nature of its claim identity analysis, in contrast to the pragmatic, qualitative analysis that the transactional test promotes. Thus, the court concluded that the "previous contention [in the segmentation claim] arose from the document that forms the factual basis of the plaintiffs' current claims" (456 F.3d at 742 (App. 17)), and that "the underlying factual transaction is identical: the preparation and finalization of the Highway 164 EIS" (*id.* at 743 (App. 20)). Pragmatic claim preclusion analysis does not end with mere identification of a document common to both cases; the qualitative significance of the document to both actions is the determining factor. *See In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1288-90 (11th Cir. 2006) (fact that Intercreditor Agreement, central to contract and fraud claims by one creditor against another, was before bankruptcy court in previous proceedings to which both creditors were party did not bar those claims in subsequent proceedings).

The focus of *Citizens I* was an alleged groundwater contamination problem, not a particular document or the process of its creation. The gravamen of that suit was *not* that the contamination problem had to be addressed in the Highway 164 EIS; it was, rather, that the problem had to be addressed, *period*. Here, however, the court simply fastened on that document as a means to equate the factual basis of the two suits, without taking into account the document's relative insignificance

to the prior suit and the peripheral nature of its relationship to the environmental problem there addressed.

Finally, disposition of the segmentation claim in *Citizens I* demonstrates that the challenged government actions in the two cases are not related in motivation, and treating those cases as a unit does not conform to the parties' expectations. Segmentation "addresses an agency's decision on where one project ends and another begins." *Citizens I*, 349 F.3d at 962 (App. 106). In segmentation cases, courts must decide whether a federal action on which an EIS has been prepared has been improperly segmented from other related action that should have been considered as part of the same action. Daniel R. Mandelker, *NEPA Law and Litigation* § 9:11 (2d ed. 2006). NEPA litigation frequently features segmentation issues. *See id.*, §§ 9:11 – 9:17 (collecting cases).

Disposition of the segmentation issue necessarily influences the analysis of the identity of claims issue. The seminal CEQ regulation on segmentation states: "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a) (App. 181). The analogy between a government agency's segmentation of projects and a litigant's splitting of claims attacking those projects is obvious; the conditions for their allowance are related.

Under CEQ regulations, agency actions are "connected," and therefore "closely related," if they: "(i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a lar-

ger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1) (App. 182). Accordingly, the FHWA regulation addressing segmentation requires that the action evaluated in each impact statement or finding of no significant impact shall:

> (1) Connect logical termini and [be] of sufficient length to address environmental matters on a broad scope; (2) Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f) (App. 183). The court of appeals in *Citizens I* examined those factors and held that each one supported the agencies' treatment of the Ackerville Bridge and Highway 164 work as separate projects. 349 F.3d at 963 (App. 106-09.)

It is highly significant to the identity of claims issue in the instant case that the agencies treated the projects separately, and that the courts overruled Citizens' previous contention that they did so unlawfully. The *Citizens I* court, in reaching the conclusion that each project had independent utility, contrasted the underlying agency motivations: the safety focus of the Ackerville Bridge Project and the highway expansion focus of the Highway 164 Project. *Id.* (App. 109). Moreover, *Citizens I* found that the record did not support the proposition that the Ackerville Bridge Project had been pretextually more concerned with road-widening than safety, agreeing instead with the agencies that "the need to bridge the train tracks is the driving force behind this

project." *Id.* (App. 108) (internal quotation marks omitted).

In other words, the agencies took and the courts endorsed the position that a challenge to the Highway 164 Project was *unavailable* to Citizens based on the operative facts pertaining to the Ackerville Bridge Project. It is simply incongruous for the court of appeals in the case at bar, then, to have ruled that Citizens' allusion to the Highway 164 EIS in its rejected segmentation claim transformed the two suits into one for claim preclusion purposes. Similarly, while the court of appeals relied on its observation that "the relief requested in the present action is similar in substantial ways to the relief requested in *Citizens I*" (*id.* at 742 (App. 17)), the relief requested against the Highway 164 Project in the first suit cannot logically support claim preclusion when the judicially sanctioned segmentation of the two projects necessarily foreclosed such relief based on the operative facts in that suit. *See Dore v. Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975) ("claim preclusion is a principle of public policy and should be applied so as to give rather than deny justice" (citation omitted)).

In sum, an appropriately narrow construction of the scope of *Citizens I*—i.e., a construction that applies the pragmatic considerations set forth in the transactional and various historical tests for claim preclusion—ineluctably demonstrates that the case at bar does not arise from the same nucleus of operative facts.

II. The Court Should Grant this Petition to Address a Conflict Among the Circuit Courts Regarding the Effect on Claim Preclusion Analysis of Facts that Did Not Exist During the Pendency, or in Any Event at the Inception, of the Previous Action.

"[S]ignificant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" requires the preparation of an SEIS. 40 C.F.R. § 1502.9(c)(1)(ii) (App. 184). The complaint in the current suit alleges that "in October 2003, WisDOT held a public information meeting to announce that three overpasses which had been included in the selected alternative [for the Highway 164 Project], as presented in the EIS and approved in the ROD [Record of Decision], would be replaced by at-grade crossings or intersections." App. 229-30. According to the complaint, "[e]limination of these overpasses reduces the safety improvements which were to be accomplished by this project, and increases a number of the environmental impacts on surrounding residents and resources." App. 230. Citizens' Fifth Cause of Action alleges that in light of those changes to the Highway 164 Project, as well as new information about the project's environmental impacts, failure to prepare an SEIS constituted a violation of NEPA. *Id.* (App. 234-35).

The district court dismissed *Citizens I* in June 2003. 349 F.3d 938 (App. 174.) The complaint in the case at bar therefore alleges that the changes in the Highway 164 Project occurred well after that dismissal. Nonetheless, the court of appeals' sweeping claim preclusion ruling barred Citizens' claim seeking preparation of an SEIS based on the alleged October 2003 changes. In that respect, the ruling conflicts with those of a number of other circuits, as well as of this Court.

If new facts—that is, facts arising after the disposition of a previous action—in themselves establish independent grounds for a claim against the defendants in a previous action, claim preclusion does not apply, even if

the new claim is based on the same legal theory as the prior action. *Moore, supra*, § 131.22[1]. In *Lawler v. National Screen Serv. Corp.*, 349 U.S. 322, 328 (1955), this Court held that a judgment dismissing a prior antitrust action alleging a conspiracy to monopolize could not bar a second action between the same parties alleging such a conspiracy based on conduct that allegedly occurred subsequent to the prior judgment. A prior judgment "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.* Claim preclusion "does not . . . bar a suit based on acts of the defendant that have occurred subsequent to the final judgment asserted as a bar." *Blair v. City of Greenville*, 649 F.2d 365, 368 (5th Cir. 1981) (dismissal of prior employment discrimination action did not preclude new action based on discriminatory acts allegedly occurring after prior judgment). *See also Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers*, 440 F.3d 1038, 1043 (8th Cir. 2006) (judgment that COE's permission to add to existing low-water bridge violated NEPA did not bar subsequent claim to compel action on application, submitted after prior judgment, for new bridge span in same location); *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 17 (1st Cir. 2004) (settlement of prior action seeking contribution for soil cleanup at waste disposal site did not bar action seeking contribution for groundwater cleanup at same site because groundwater remediation had not occurred at time of settlement).

The decision of the court of appeals in the instant case also conflicts with *The New River Valley Greens v. U.S. D.O.T.*, 161 F.3d 3, 1998 WL 633959 (4th Cir. 1998)

(unpublished disposition),[4] a case decided under NEPA. There the plaintiffs had unsuccessfully challenged the failure to prepare a SEIS concerning a decision by government agencies to move a portion of a previously approved highway project. 1998 WL 633959 at *1. An Intelligent Transportation System (ITS) was part of the highway project, but the agencies had not yet developed its specific design and, accordingly, the EIS could not evaluate it in detail. Nor did the agencies have the details by the time of the judgment. After dismissal of the first suit, the agencies completed and revealed the design of the ITS. The plaintiffs again sued to require a SEIS, this time concerning the impact of the ITS. *Id.* at *2.

The court of appeals held that the prior judgment could not bar a challenge to the agencies' failure to prepare an SEIS based on details of the ITS design that the agencies had developed after that judgment: "NEPA compliance is never really done until all major federal action is done. Hence, there is a viable question presented by this suit: whether the details of the ITS hardware compelled the preparation of a Supplemental EIS ('SEIS')." *Id.* at *3. The court reasoned: "'It would be incongruous with . . . [NEPA's] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.'" *Id.* (quoting *Marsh v. Oregon Natural Resources Coun.*, 490 U.S. 360, 371 (1989)).

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[4] Circuit Rule 36(c) of the Fourth Circuit permits citation of an unpublished opinion of that court if counsel believes that it "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well . . . ."

The ruling of the court of appeals here, to the extent that it bars Citizens' challenge to the Highway 164 Project based on the agencies' changes to that project subsequent to judgment in *Citizens I*, is so fundamentally unsound that it calls for an exercise of this Court's supervisory power, even apart from the conflict of that ruling with decisions in other circuits.

In addition to the alleged October 2003 changes, Citizens based their Fifth Cause of Action on other new information that allegedly "demonstrates the existence of impacts on travel demand, total vehicle trips, motor vehicle emissions, and health risks not contemplated by the defendants in the original EIS." App. 234-35. Citizens alleged that this information "has become available during and after preparation of the EIS ...." App. 234. Some such information may have become available not only after preparation of the EIS but also after commencement or even the dismissal of *Citizens I*, or the agencies' declination to prepare an SEIS on the basis of that new information may have followed one or both events. The pleadings do not eliminate those possibilities, and because no court has reached the merits, the claim preclusion analysis necessarily proceeded on the basis of the pleadings.

To the extent that such new information developed after the *Citizens I* judgment, it is equivalent for claim preclusion purposes to the October 2003 project changes just discussed. To the extent that such new information predated that judgment but postdated commencement of that case, it invokes a conflict among circuit court decisions. Various circuits have held that claim preclusion does not bar claims that arise after commencement of suit but before judgment. *S.E.C. v. First Jersey Securi-*

ties, Inc., 101 F.3d 1450, 1464 (2d Cir. 1996), *cert. denied*, 522 U. S. 812 (1997), held:

> If a defendant engages in actionable conduct after a lawsuit is commenced, the plaintiff may seek leave to file a supplemental pleading to assert a claim, based on the subsequent conduct. *See* Fed.R.Civ.P. 15(c). But he is not required to do so, and his election not to do so is not penalized by application of res judicata to bar a later suit on that subsequent conduct.

See also Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992) ("We do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation."); *Drake v. F.A.A.*, 291 F.3d 59, 66-67 (D.C. Cir. 2002) (no claim preclusion of claim based on agency action occurring after commencement of previous lawsuit against agency concerning legality of drug testing of airline employee). *But see Stone v. Dept. of Aviation*, 453 F.3d 1271, 1278 (10th Cir. 2006) (claim preclusion "doctrine requires a plaintiff to join all claims together that the plaintiff has against the defendant *whenever during the course of the litigation related claims mature* and are able to be maintained"; plaintiff must seek to amend complaint to add claims that mature after filing of initial complaint); *Havercombe v. Dept. of Educ. of Com. of P.R.*, 250 F.3d 1, 8 (1st Cir. 2001) (claim based on discriminatory conduct allegedly occurring after time period covered by judgment in prior action was barred, where plaintiff could have moved to amend complaint to include claim in that action).

III. The Court Should Grant this Petition in the Exercise of Its Supervisory Power to Consider the Circumstances in which a Court of Appeals May Depart from Random Assignment of Panel Judges.

The three judges who comprised the court of appeals panel in the case at bar are the same three judges who heard the appeal in *Citizens I* (App. 1, 62). The chance that random assignment of judges in the second case would yield this result is so miniscule as to exclude it under the rubric of Occam's razor. *See Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981) (simple and obvious explanation for "startling" disparity of traffic ticket caseloads among judges in certain counties is that arresting officers make affidavits returnable to the judge they believe most likely to convict the defendant). The panel assignment in this case was not random.

Internal Operating Procedure 6 of the Seventh Circuit provides for assignment of an appeal to the same panel that heard a previous appeal in three situations: (a) where this Court has remanded for further proceedings, (b) a successive appeal in the same case, and (c) a successive petition under 28 U.S.C. §§ 2254 or 2255.[5] Because (a) and (c) do not even colorably apply here, the court implicitly treated the case at bar as a successive appeal in the same case under IOP 6(b) (App 184-85).

Obviously, it is not. Citizens commenced the February 2005 suit as a separate, original action in the dis-

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[5] IOP 6(d) provides that when a motion panel sets a motion or petition for oral argument or expedites the appeal, the appeal may be assigned for argument and decision to the same panel. There was no motion panel or expedited appeal in the case at bar.

trict court. That event occurred almost two years after the district court's final judgment in *Citizens I.* Each case had a separate file number, both in the district court and in the court of appeals. (App. 1, 23, 62, 111).

The Seventh Circuit has in other cases invoked IOP 6(b), which applies by its terms only to successive appeals in the *same* case, to treat (or indicate that it would treat) an appeal as a "successive" one to an appeal in a *different* case, when it deemed the cases to be sufficiently "related." *See*, e.g., *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 839 (7th Cir. 1999) (separate plaintiffs' class actions raised the same issues against same defendant; one class was subset of another but class representatives were different in each case); *Brokaw v. Weaver*, 305 F.3d 660, 663 (7th Cir. 2002) (separate constitutional tort actions against family members and public officials by siblings who been removed from parents). *See also McDermott, Inc. v. Wheelabrator-Frye, Inc.*, 649 F.2d 489, 492 n.7 (7th Cir. 1980) (appeals in separate cases involving rival tender offerors for stock of the same company assigned to same panel).

While litigants acquire no rights under the Seventh Circuit's Internal Operating Procedures (*see* Preamble to Internal Operating Procedures), that fact does not circumscribe this Court's supervisory power over the courts of appeals. And this case calls for an exercise of that power.

Neutral assignment of appellate judges to panels "represents a critical and underestimated component of the judicial process. Because judges are human and bring a basket of biases to the bench, it is their neutral selection that helps preserve judicial integrity." J.

Robert Brown, Jr. and Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX.L.REV. 1037, 1102 (2000) (footnotes omitted). To create neutrality, every circuit uses a random assignment system to compose three-judge panels. *Id.* at 1041 (footnote omitted); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630 (1994) (describing random assignment as a central characteristic of federal judicial procedure); *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* at 8 (2003). Brown and Lee, however, on the basis of their detailed empirical study of assignment practices in the circuits, reported that "substantial amounts of discretion erode the randomness of those systems." Brown and Lee, *supra*, at 1041-42 (footnote omitted). Brown and Lee argue for limits on discretion and greater transparency in panel assignment decisions in federal courts.

The potential for "outcome-oriented assignments . . . does exist in any system with excessive discretion. Excessive discretion is inherent in any system that does not objectively define the exceptions to random assignment . . . ." *Id.* at 1102 (footnote omitted). In fact, perceptions of discretionary departures from random assignment of panel judges have fueled considerable debate and tension within several federal circuit courts and in the public arena. For example, in 1963, Judge Cameron of the Fifth Circuit, as well as the media, accused that court of manipulating panel assignments in several key civil rights cases. *See id.* at 1043-65. In 2002, Judge Boggs of the Sixth Circuit, in a high-profile case challenging the constitutionality of a law school's affirmative action admission policy, accused the chief circuit judge of attempting to influence the outcome by

disregarding an internal operating procedure calling for random assignment to replace an absent panel member. *Grutter v. Bollinger*, 288 F.3d 732, 810-814 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd* 596 U.S. 306 (2003).

Because the assignment of the instant case to the same panel that heard *Citizens I* entails a discretionary departure from a random assignment system, it poses a serious problem for the principle of neutrality.[6] The sole issue was whether the judgment reviewed in the first appeal barred the claim made in the second. Treating the latter as a successive appeal in the same case, when procedurally it was not, was tantamount to a prejudgment that claim preclusion should apply. Whether or not the panel itself caused the assignment, it necessarily knew that it had the case only because it had been deemed "the same case" as *Citizens I*, which was, in essence, the very issue on which the appeal would rise or fall.

The problem hardly disappears if the cases are deemed to be related rather than the same under an expansive (and insupportable) interpretation of IOP 6(b). The practice of departing from random panel assignment, by assigning the same panel that heard a previous appeal in a different case when the cases are deemed to be sufficiently "related," presents both a general neutrality problem and such a problem specific to the case at bar. The general problem is that the practice represents a departure from a random assignment sys-

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[6] Because the Seventh Circuit's practice is not to reveal the identity of panel members until the day of oral argument (*Practitioner's Handbook*, *supra*, at 8), Citizens had no meaningful opportunity to object to the composition of the panel in the case at bar.

tem that is not only unnecessary but also dangerous. It infects that system with "excessive discretion" because the parameters governing the judgment of case-relatedness, as well as the identity of the person(s) making that judgment, are unknown to the litigants.

The specific problem with the "related case" practice in this case—where, unlike *Blair*, *Brokaw*, and *McDermott*, claim preclusion is not only an issue but *the* issue—is that the under IOP 6(b), the panel could retain the appeal only by, in essence, prejudging that issue. A panel assigned to the successive appeal must as a threshold matter determine whether it will retain it for decision on the merits. It is to do so "unless there is no overlap in the issues presented." That exception certainly applies here, where no claim preclusion issue was present in *Citizens I* and it is the only issue in *Citizens II*. Even then, however, the panel still may retain the appeal when it "involves the same essential facts as the earlier appeal." Thus, the panel must have essentially decided the claim preclusion issue simply in order to retain the appeal. Put differently, under IOP 6(b) the panel assigned to the case at bar could only have decided the claim preclusion issue as it did.

The panel assignment procedure in the case at bar casts a shadow over the perceived integrity of the appellate decisionmaking process. Moreover, it illustrates an issue—the proper limits of discretion in departing from random assignment of panel judges—that clearly extends beyond this case and is crucial to the actual and perceived neutrality of the federal appellate courts. As such, it is an issue both well-suited to and needful of this Court's exercise of its supervisory power.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

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APPENDIX

Decision of Court of Appeals
dated August 2, 2006 (*Citizens II*) 1

Decision and Order of District Court
dated April 27, 2005 (*Citizens II*) 23

Decision of Court of Appeals
dated November 5, 2003 (*Citizens I*) 62

Decision and Order of District Court
dated June 4, 2003 (*Citizens I*) 111

Order of Court of Appeals
dated October 12, 2006 (*Citizens II*) 177
denying Petition for Rehearing

Statutes and Regulations Involved 178

Complaint dated July 3,2002 (*Citizens I*) 186

Complaint dated February 22, 2005
(*Citizens II*) 203

Map of Ackerville Bridge Project
Location (p.1-2 of EIS) 244

In the
United States Court of Appeals
For the Seventh Circuit

(456 F.3d 734)

No. 05-2667

HIGHWAY J CITIZENS GROUP
and WAUKESHA COUNTY
ENVIRONMENTAL ACTION LEAGUE,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION, MARIA CINO,[1] Acting
Secretary of Transportation, FEDERAL
HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 05 C 212—**Lynn Adelman**, *Judge.*

ARGUED FEBRUARY 14, 2006—DECIDED AUGUST 2, 2006

Before BAUER, RIPPLE and WILLIAMS, *Circuit Judges.*

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), we have substituted the current acting United States Secretary of Transportation, Maria Cino, for her predecessor, Norman Mineta, as the named respondent.

RIPPLE, *Circuit Judge*. In 2005, the Highway J Citizens Group ("Citizens") and the Waukesha County Environmental Action League ("WEAL") brought this action against the United States Department of Transportation ("DOT"), the Secretary of Transportation in his official capacity, the Federal Highway Administration ("FHWA"), Mary Peters in her official capacity as the Administrator of FHWA, the United States Army Corps of Engineers ("Corps"), Michael Pfenning in his official capacity as District Engineer for the Corps, and Frank Busalacchi in his official capacity as Secretary of the State of Wisconsin Department of Transportation ("WisDOT"). The plaintiffs alleged that federal approval of a project to expand an eighteen-mile segment of the former County Highway J/Wisconsin State Highway 164 violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq.; the Clean Water Act ("CWA"), 33 U.S.C. § 1344; the Federal-Aid Highway Act ("FAHA"), 23 U.S.C. § 101 et seq.; and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq. The district court denied the plaintiffs' motion for a preliminary injunction; it held that the plaintiffs had not demonstrated a reasonable likelihood of success on the merits of their claims because those claims likely were barred by claim preclusion. The plaintiffs now appeal. They contend that the doctrine of res judicata is not applicable to the present case because the claims that they seek to litigate here are factually and legally distinct from those that they litigated previously. Because we believe that the district court correctly held that this action is barred by res judicata, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

There are two construction projects at issue in this litigation; both are "major Federal actions"[2] as defined

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[2] The National Environmental Policy Act ("NEPA") requires that a recommendation for any "major Federal action[] significantly affecting the quality of the human environment" include a "detailed" Environmental Impact Statement ("EIS") describing:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long- term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C); *see also* 40 C.F.R. § 1502.14 (further defining what an EIS must contain). Federal-Aid Highway Act ("FAHA") regulations impose similar requirements. *See* 23 C.F.R. § 771.123 (setting forth applicable procedures and requiring that the "draft EIS . . . evaluate all reasonable alternatives to the action[,] [] discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study [and] . . . summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process").

by federal environmental regulations.[3] The first, the County J/Highway 164 Project (Project # 2748-01-01), involves the expansion of an eighteen-mile segment of Wisconsin State Highway 164[4] from two to four lanes. In 1999, these eighteen miles, which run through Waukesha and Washington Counties in Wisconsin, were experiencing substantial traffic congestion, delays and related safety issues. The Wisconsin Department of Transportation ("WisDOT") commissioned a study of proposals to increase the highway's capacity. The WisDOT, in conjunction with the Federal Highway Administration ("FHWA") and as required by federal law, subsequently drafted an Environmental Impact Statement ("EIS") that recommended widening the highway. *See* R.19, Ex.5. The proposed expansion converts approximately 100 acres of land for highway use and, according to the plaintiffs, raises significant

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[3] *See* 40 C.F.R. § 1508.18 (defining a "[m]ajor Federal action" as an action "with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action").

[4] When initially constructed in the 1970s, this highway was designated "County Highway J." However, in 1986, the relevant section of the highway was transferred to the WisDOT and was redesignated "Highway 164." We therefore refer to the road as "Highway 164" and to the project as the "Highway 164 Project" throughout this opinion.

environmental concerns with regard to the destruction of wetlands.[5]

The EIS for the project was made available to the public on April 9, 2001, and a public hearing was held on May 30, 2001. On December 11, 2001, the FHWA and WisDOT issued a revised EIS; this document addresses alternative proposals raised during the hearing, but concludes in favor of expanding the highway. The DOT and FHWA issued a Record of Decision ("ROD")[6] on March 6, 2002, marking their final approval of the recommendations contained in the revised EIS. Construction by WisDOT, using federal funds appropriated under FAHA, now has commenced on this project. Phase I was completed in late 2004; on January 14, 2005, the Army Corps granted a permit under § 404 of the CWA to the WisDOT to fill 9.27 acres of wetlands, thus allowing the WisDOT to commence Phase II of the project.

The second project, Project # 2748-01-00, is known as the "Ackerville Bridge/Lovers Lane Reconstruction Project" ("Ackerville Bridge Project"). It primarily

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[5] Highway 164 is located within the Upper Fox portion of the Illinois-Fox River watershed; this area is considered a "Priority Watershed" by the Wisconsin Department of Natural Resources. *See* R.10, Ex.A.

[6] FAHA and NEPA regulations require the FHWA and DOT, respectively, to certify their final approval of a major federal action by issuing a Record of Decision ("ROD"). The ROD must "present the basis for the [agency's] decision" and "summarize any mitigation measures that will be incorporated in the project." 23 C.F.R. § 771.127(a); *see also* 40 C.F.R. § 1505.2(b) (requiring the relevant agency to identify the alternatives considered and the considerations balanced in reaching a final decision).

involves the construction of two overpass structures on Highway 164 in Washington County, near the northern end of the highway expansion project. One overpass will cross railroad tracks, thus eliminating the need for existing at-grade crossings; thesecond overpass will facilitate passage over State Highway 175. Like the Highway 164 expansion project, the new overpass structures are designed to ease the flow of traffic.

The Ackerville Bridge Project commenced with the FHWA and WisDOT's preparation of an Environmental Assessment ("EA").[7] After a public hearing was held in March 2000, the FHWA issued a "Finding of No Significant Impact"; the FHWA concluded that the construction of the overpasses would not affect

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[7] NEPA regulations provide that, when the significance of the environmental impact of a transportation project proposal is uncertain, an Environmental Assessment ("EA") should be prepared to assist in making this determination. The EA should:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary. 40 C.F.R. § 1508.9(a). The EA also must "include brief discussions of the need for the proposal, . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Id.* § 1508.9(b). If a finding of no impact is made, no further action is required. If, however, the agency makes a preliminary finding that the project may result in significant environment impacts, it must commence immediately the preparation of an EIS.

significantly the quality of the human environment. Construction on this project began in May 2002.

B. The *Citizens I* Litigation

Highway J Citizens Group ("Citizens") is an unincorporated association representing citizens of Waukesha and Washington Counties in Wisconsin "who are concerned about the potential destruction of the region along [Highway] 164 and [County Highway] J." R.1 at 6. According to the complaint in this case, Citizens' mission includes "maintaining Highway 164 as a two-lane scenic road[,] [] maintaining the environmental resources and preserving the remaining rural character of the area." *Id.*

In July 2003, Citizens filed suit in the United States District Court for the Eastern District of Wisconsin against the Secretary of Transportation in his official capacity; Frederick Wright in his official capacity as Executive Director of the FHWA; and Thomas E. Carlsen in his official capacity as Acting Secretary of the WisDOT. Citizens alleged that the defendants' approval of the Highway 164 and Ackerville Bridge projects violated the APA, 5 U.S.C. §§ 701-06; NEPA, 42 U.S.C. § 4321 et seq.; regulations implementing NEPA; and the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11, Wis. Admin. Code Transp. § 400 et seq. Citizens first claimed that drilling for the Ackerville Bridge Project risked disturbing an underground "contamination plume" containing arsenic and trichlorethylene, which was migrating towards the site of construction. *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 942 (7th Cir. 2003) ("Citizens I"). Citizens requested that the court enjoin the continued construction of the Ackerville bridges, as well as require the defendants to fill current holes with

concrete. They also asked the court to mandate that the defendants conduct another environmental impact study; they claimed that the EA for the Ackerville Bridge Project failed to examine the implications of the contamination plume. Second, Citizens contended that the FHWA and WisDOT had failed to consider reasonable alternatives to the building of the Ackerville bridges. Lastly, Citizens claimed that the defendants had improperly segmented[8] the Ackerville Bridge Project from the Highway 164 Project. *See Citizens I* Complaint, Supp. App. at 192 (arguing that the two actions constitute "one project or, if not, the Lovers Lane Road/Ackerville Project is an interdependent part of the larger action and depends on the larger action for its justification"). According to Citizens, both the EIS for the Highway 164 Project and the EA and Finding of No Significant Impact for the Ackerville Bridge Project were incomplete because each project failed to take into account the environmental impacts of the other. *See id.* at 193. As a remedy, Citizens requested that the court require the defendants to prepare another "[EIS] for all of the County J/Highway 164 project," as well as "enjoin[] the defendants from widening County J/Highway 164 . . . from two lanes to four lanes." *Id.* at 193-94.[9]

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[8] Segmentation is a procedure that "allows an agency to avoid the NEPA requirement that an EIS be prepared for all major federal actions with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects." *City of West Chicago v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 650 (7th Cir. 1983).

[9] Citizens also requested that the court enjoin the reconstruction and realignment of Lovers Lane Road, which is considered part of the Ackerville Bridge Project. Lovers Lane is (Continued...)

On June 12, 2003, the district court denied Citizens'motion for a preliminary injunction and then ruled against Citizens on the merits. In pertinent part, the district court determined that the defendants' environmental analysis was thorough and sufficient, as was their consideration of feasible alternatives. The district court further found that the defendants had made a "reasonable decision in establishing the project termini" and that the Ackerville Project had not been segmented improperly from the Highway 164 Project. *Id.* at 179.

Citizens appealed. We affirmed the judgment of the district court. *See Citizens I,* 349 F.3d 938. We agreed with the district court that the defendants' environmental analysis and consideration of alternatives were sufficient. *See id.* at 952-62. We also affirmed the district court's holding on the segmentation issue:

> In the [EA and Finding of No Significant Impact], the defendants explicitly considered the three criteria for segmentation set out in 23 C.F.R. § 771.111, and gave a reasoned justification of how their segmentation fit each factor. As to logical termini, the defendants explained that "[s]ince the need to bridge the train tracks is the driving force behind this project," the south termini for the Project was

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(...continued)
the name of the northern-most portion of Highway 164, after it crosses the trackage of the Wisconsin Central Limited and the Wisconsin Southern Railroads.

> established just beyond the bridge touchdown point.
>
> . . .
>
> The second factor, independent utility, is the most important factor in highway cases such as this. . . . With respect to this factor, the [EA and Finding of No Significant Impact] pointed out that neither the bridge construction project, with its safety focus, or the County J/Highway 164 Project, with its expansion focus, require the construction of any other projects to be usable.
>
> Finally, as to the third factor, restriction of alternatives, the Ackerville Bridge Project contemplates, rather than restricts, future roadway projects, including the possibility of a four-lane project if found to be needed. Indeed, making space for future expansion was a "secondary purpose" for the Project in the first place.
>
> In sum, the defendants analyzed the relevant factors set out in 23 C.F.R. § 771.111(f)(1)-(3), and came to a reasoned conclusion. There is also no real evidence to support pretextual motive. Accordingly, we hold there was no improper segmentation in this case.

Id. at 963 (internal citations omitted).

C. The Present Litigation

On February 22, 2005, Citizens, together with WEAL, a Wisconsin non-profit corporation also dedicated to protecting Waukesha County's natural resources, filed

the present lawsuit. They alleged that the DOT, FHWA and WisDOT's final approval of the Highway 164 Project and the Army Corps' issuance of a Clean Water Act § 404 permit violates the APA, 5 U.S.C. § 500 et seq., the CWA, 33 U.S.C. § 1344, the FAHA, 23 U.S.C. § 101 et seq. and NEPA, 42 U.S.C. § 4321 et seq.[10]

In March 2005, the plaintiffs filed a motion for a temporary restraining order ("TRO") and a preliminary injunction, requesting that the court enjoin the defendants from "proceeding with any further property

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[10] The plaintiffs' complaint contains eight counts. Counts I-V allege violation of the APA and NEPA stemming from the defendants' failure to prepare an Environment Impact Statement that discusses in sufficient detail the environmental effects of the Highway 164 Project; the defendants' reliance on unreliable and inaccurate data with regard to the project's impact on area wetlands; the defendants' failure to consider reasonable alternatives to expanding Highway 164, namely the improvement of the existing two-lane highway; the defendants' failure to respond adequately to public comments; and the defendants' failure to prepare a Supplemental Environmental Impact Statement when new information, indicating that the expansion of the highway would have a significantly greater impact on the surrounding environment than previously believed, became available. Counts VI and VII allege violation of the FAHA and its implementing regulations because the defendants did not fully consider the adverse effects of air pollution prior to approving the new highway project; adopt appropriate measures to minimize those hazardous effects; or hold hearings at which the public could "hear and be heard." R.1 at 31. Count VIII alleges that the Army Corps of Engineers violated the CWA in granting other defendants a § 404 permit, allowing the WisDOT and FHWA to fill in approximately nine acres of wetlands in connection with the project; the plaintiffs claim that there exist practicable alternatives to destroying the wetlands, which would have a less destructive impact on the environment.

acquisition, demolition, grading, construction or any other physical work on the highway 164 expansion project north of Swan Road in Waukesha County." R.8 at 2-3.

On March 21, 2005, the district court[11] denied the plaintiffs' request for a TRO. It held that the plaintiffs had not proven that they would suffer "irreparable injury before [their] adversary [could] be heard." R.13 at 2. According to the court, construction on Phase II of the project was not scheduled to begin until April 2005, and the defendants could be heard within that time frame. The court directed expedited proceedings on the plaintiffs' motion for a preliminary injunction.

On April 27, 2005, the district court denied the plaintiffs' motion for a preliminary injunction. *See* R.46. It held that the plaintiffs had not established a "reasonable likelihood of success on the merits of [their] claims." *Id.* at 11. In pertinent part, the court held that the plaintiffs' current challenges to the Highway 164 Project were barred by claim preclusion because *Citizens I*: (a) culminated in a final decision on the merits, *see id.* at 13 n.14; (b) involved the same parties as the present action, or their privies, *see id.* at 14-16; and (c) involved the same cause of action as the present litigation, *see id.* at 17-24. Concerning the last element, the court held that *Citizens I*, although focused on the Ackerville Bridge Project and the alleged errors in the EA prepared for that project, also challenged the EIS prepared for the widening of Highway 164, the same

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[11] This order was issued by the district judge initially assigned to the case. Subsequently, this judge recused himself and the case was reassigned.

document that forms the basis of the plaintiffs' present claims. Specifically:

> [The] plaintiffs argue that they did not challenge the March 6, 2002 ROD in *Citizens I*. . . . However, although Citizens never mentioned the March 6, 2002 ROD in *Citizens I,* it is clear that it challenged that decision in that case when it argued that the County J/Highway 164 project was improperly segmented from the Ackerville Bridge project. A claim that one project was improperly segmented from another is necessarily a claim that the environmental review conducted for *each* project was inadequate because each review failed to consider the environmental effects of the other project.

Id. at 19-20 (emphasis in original).

In addition, the court held that the relief requested by the plaintiffs in *Citizens I* demonstrated that there was an identity between the cause of action in that litigation and the cause of action in the present suit. *See id.* at 20 ("Indeed, Citizens must have recognized that success on their segmentation claim in *Citizens I* entailed the invalidation of the ROD which approved the County J/Highway 164 project because, in that case, Citizens sought to enjoin the County J/Highway 164 project and compel FHWA and WisDOT to prepare an EIS governing both projects."). The court concluded that, although the legal theories relied upon by the plaintiffs in the present litigation are not the same as those relied upon in *Citizens I,* there exists an identity of issues between them because both cases arise from the "same transaction" and involve "the same, or nearly

the same[,] factual allegations." *Id.* at 22 (internal quotation marks omitted).

The plaintiffs timely filed a notice of appeal, as well as a motion for an injunction pending appeal. *See* Fed. R.Civ. P. 62(c). The district court denied this motion, determining that, because the plaintiffs had not demonstrated a likelihood of prevailing on the merits of their claims, an injunction pending appeal was not warranted. *See* R.61.

II

DISCUSSION

We review de novo a district court's denial of a motion for a preliminary injunction on res judicata grounds.[12] Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "The three requirements for *res judicata* under federal law are: (1) an identity of the parties or their privies; (2) an identity of the causes of actions; and (3) a final judgment on the merits." *Cent. States, S.E. & S.W. Areas Pension Fund v. Hunt Truck Lines, Inc.*, 296 F.3d 624, 628 (7th Cir. 2002). If these requirements are fulfilled, res judicata "bars not only those issues which were actually decided in a prior suit, but also all issues

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[12] *See Matter of L & S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir. 1993) (holding that, although factual determinations made in the course of evaluating a motion for a preliminary injunction are reviewed for clear error, "legal conclusions are subject to *de novo* review").

which could have been raised in that action." *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 338 (7th Cir. 1995). "Simply put, the doctrine of *res judicata* provides that, when a final judgment has been entered on the merits of a case, it is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (internal quotation marks omitted).

The plaintiffs do not contest that *Citizens I* resulted in
a final judgment. Nor do they dispute that, although WEAL was not a named plaintiff in the prior litigation, WEAL and Citizens are in privity. However, they do challenge whether the present cause of action is the same as, or has an "identity" with, the cause of action raised by Citizens in *Citizens I*. A claim has "identity with a previously litigated matter if it emerges from the same core of operative facts as that earlier action." *Brzostowski*, 49 F.3d at 338-39 (internal quotation marks omitted). The district court, the plaintiffs submit, mischaracterized their contentions in *Citizens I*. According to the plaintiffs, the *Citizens I* litigation focused exclusively on the lawfulness of the Ackerville Bridge Project and simply did not "challenge the Highway 164 Project." *See* Reply Br. at 4-5 (citing the numerous "differentiating facts between the projects").

We agree with the plaintiffs that the Ackerville Bridge and Highway 164 Projects are factually

distinct.[13] *See Citizens I*, 349 F.3d at 962-63. We nevertheless must conclude that *Citizens I* challenged the validity of *both* projects and therefore the plaintiffs cannot relitigate claims arising out of either project. Specifically, in *Citizens I*, Citizens raised the following contentions: (1) that the Finding of No Significant Impact for the Ackerville Bridge Project failed to account for the environmental impacts of the contamination plume; (2) that the defendants had failed to consider "reasonably feasible alternatives to the building of the proposed bridge," *Citizens I* Complaint, Supp. App. at 190; and (3) that the Highway 164 and Ackerville Bridge Projects had been segmented improperly. With regard to the last contention, Citizens alleged that, by treating the Ackerville Bridge Project as a separate endeavor, the defendants were able to avoid "address[ing] the environmental issues raised by the presence of the contaminate plume" in drafting the Highway 164 EIS.[14]

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[13] Although unnecessary to our decision today, we note the post hoc nature of the plaintiffs' position. Throughout the *Citizens I* proceedings, the plaintiffs maintained that the two projects were, in fact, intricately interlinked. Indeed, it is this claim that we addressed in Citizens' prior appeal. *See Highway J Citizens Group v. Mineta*, 349 F.3d 938, 962-63 (7th Cir. 2003) (holding that the two projects had been properly segmented).

There is no need to address the implications of this contradiction in Citizens' position today. As we explain in the text, although we agree with the plaintiffs that the projects are independent, we nevertheless hold that the plaintiffs' current challenges to the Highway 164 Project should have been raised in *Citizens I*.

[14] The plaintiffs contend that these allegations are immaterial because, in *Citizens I*, Citizens did not explicitly challenge the Record of Decision ("ROD") for the Highway 164 Project; rather, (continued...)

Id. at 193. As a result, Citizens continued, the Highway 164 EIS was incomplete and inaccurate. Notably, this previous contention arose from the same document that forms the factual basis of the plaintiffs' current claims. In addition, the relief requested in the present action is similar in substantial ways to the relief requested in *Citizens I*—a consideration that our cases counsel ought to be given significant weight in determining whether there is an identity between the plaintiffs' causes of action for res judicata purposes.[15] In *Citizens I*, Citizens requested that the court "requir[e] the defendants to prepare a Final Environmental Impact Study for all of the County J/Highway 164 project" and "[p]reliminarily and permanently enjoin[] the defendants from widening County J/Highway 164." *Citizens I* Complaint, Supp. App. at 193-94. Similarly, in this litigation, the plaintiffs request that the court

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(...continued)
according to the plaintiffs, the references in the *Citizens I* complaint to Highway 164 were limited to the EIS. A ROD, however, marks the final approval of the recommendations contained in an EIS. Because any error in the EIS thus becomes an error in the ROD, the documents are inseparable for the purpose of res judicata analysis.

[15] *See Anchor Glass Container v. Buschmeier*, 426 F.3d 872, 878 (7th Cir. 2005) (holding that, because the "ultimate relief sought in the two actions" is the same, "there is sufficient identity of the causes of action [in the current and past litigations] for res judicata to apply"); *see also Friez v. First Am. & Trust of Minot*, 324 F.3d 580, 581 (8th Cir. 2003) (deeming relevant to its res judicata analysis that the plaintiff "seeks effectively the same relief (ERISA benefits) in both cases"); *United Tech. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1345 (Fed. Cir. 1999) (holding that the two suits involved identical causes of action, in part because the "relief sought by Chromalloy in both actions is intertwined").

"prohibit[] Defendants USDOT and FHWA from taking any other action that in any way supports or funds the design, property acquisition, construction or development of the [Highway 164 expansion] project until Defendants have remedied their violations of NEPA, the APA, and federal highway law," as well as require the defendants to prepare a supplemental EIS for the Highway 164 Project. R.1 at 35 (also requesting that the FHWA vacate the original EIS and ROD for the Highway 164 Project). Accordingly, we must conclude that, in the course of arguing that the two projects had been improperly segmented, Citizens placed into dispute the validity of the environmental assessment for the Highway 164 Project.

In our consideration of this matter, we note Citizens' view that the mere mention of Highway 164 in the complaint does not mean that Citizens necessarily challenged the overall validity of the environmental assessment of that project. They submit that, in contending that the relevant agencies improperly segmented the two projects, they focused primarily, or even exclusively, on errors in assessing the environmental effects of the Ackerville Bridge Project, referencing Highway 164 only out of necessity. We cannot accept this argument, however. Citizens' attempt to minimize the significance it placed on the Highway 164 Project in *Citizens I* is unavailing. According to the plain text of the documents filed in *Citizens I,* Citizens submitted that segmentation was improper because it caused the Highway 164 EIS, *not* the Ackerville Bridge EA, to be underinclusive and therefore inaccurate. The thrust of Citizens' submission was that the improper segmentation permitted the FHWA and WisDOT to prepare the Highway 164 EIS without first examining or accounting for contamination issues near the Ackerville bridges. *See*

Citizens I Complaint, Supp. App. at 193-94 (alleging that the "reason that the defendants have segmented the bridge project . . . is so that the EIS for the project 2748-01-01 [the Highway 164 Project] . . . would not have to address the environmental issues raised by the presence of the contaminate plume" and that, as a result, a new "Final Environmental Impact Study for all of the County J/Highway 164 project" is necessary). It is clear from these documents that, in *Citizens I*, Citizens challenged the procedures followed in preparing the environmental analysis for the Highway 164 expansion and, thus, there is an identity between the cause of action in *Citizens I* and the cause of action in the present case.

To be sure, the plaintiffs in the present litigation do not pursue the precise legal theories that we addressed in *Citizens I*. In the prior litigation, Citizens' only argument with regard to the Highway 164 Project was that the defendants' failure to take into account the environmental effects of the contamination plume near the Ackerville bridges rendered the EIS on that project invalid. By contrast, in the present litigation, the plaintiffs claim that the Highway 164 EIS is inaccurate, fails to consider the cumulative environmental effects of the construction or reasonable alternatives to highway expansion, and suffers from the lack of a meaningful opportunity for public commentary. They also allege a violation of the FAHA on the ground that the defendants failed to consider, and attempt to remedy, hazardous air pollution stemming from the proposed construction.

However, the question is not whether the legal issues now presented were raised previously; rather, it is whether these matters "*could have been raised* in [the prior] action." *Brzostowski*, 49 F.3d at 338 (emphasis

added). To determine "whether the plaintiff could have raised the [current] issue[s] in the first suit," we employ a "same transaction" test. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993). Under this test,

> a cause of action consists of a single core of operative facts giving rise to a remedy. . . . Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost. A plaintiff may not avoid an earlier judgment on the merits by merely concocting a new legal theory.

Id. (internal citations and quotation marks omitted).

Here, although the legal elements of each claim may be different, the underlying factual transaction is identical: the preparation and finalization of the Highway 164 EIS.[16] As in *Brzostowski*, the resolution of both of the plaintiffs' complaints are grounded in the adequacy of the environmental analysis for the Highway 164 Project. *See Brzostowski*, 49 F.3d at 339 ("[W]e find that the two claims before us clearly arise out of the same core of operative facts and are based on

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[16] We take no position on whether the plaintiffs' CWA claim against the Army Corps, who was not a party to the *Citizens I* litigation, is also barred by res judicata. The district court concluded that the plaintiffs had not demonstrated a reasonable likelihood of success on their CWA claim, given that there is no evidence that the Corps, in issuing to the WisDOT a § 404 permit, had failed to consider "practicable alternatives" to the expansion of the highway or that the Corps understated the wetlands impact of the project. R.46 at 24-32. The plaintiffs do not challenge these conclusions on appeal. Therefore, this appeal does not implicate the Supreme Court's recent decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

the same factual allegations. While the legal elements of each claim may be different, the central factual issues are identical."). Notably, Citizens has not argued that they were not *able* to bring their present claims in the earlier litigation. Nor could such an argument have been made. All transactions forming the basis of the plaintiffs' causes of action, including the final approval of the Highway 164 EIS by the FHWA and DOT, had occurred by the time *Citizens I* was filed on July 3, 2002: The Highway 164 EIS was drafted and disclosed to the public in April 2001; the ROD for the project was issued on March 6, 2002.

In sum, because the plaintiffs challenged the approval of the Highway 164 Project in *Citizens I*, because the current claims stem from the same factual transaction as the legal claims addressed in that prior litigation and because the plaintiffs had a fair opportunity to raise their claims previously, we must conclude that res judicata bars the plaintiffs from further pursuing their challenges to the Highway 164 Project. As the Supreme Court noted emphatically in *Baldwin v. Iowa State Traveling Men's Ass'n,* 283 U.S. 522, 525 (1931), "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered settled as between the parties."

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

s/ _____
Clerk of the United States Court of Appeals for the Seventh Circuit

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USCA-02-C-0072—8-2-06

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP, U.A.
and WAUKESHA COUNTY
ENVIRONMENTAL ACTION LEAGUE
Plaintiffs,

v. Case No. 05-C-0212

UNITED STATES DEPARTMENT OF TRANSPORTATION; Secretary of Transportation NORMAN MINETA; FEDERAL HIGHWAY ADMINISTRATION; Administrator of Federal Highway Administration MARY PETERS; U.S. ARMY CORPS OF ENGINEERS; District Engineer MICHAEL F. PFENNING; and FRANK BUSALACCHI, in his official capacity as Secretary of the State of Wisconsin Department of Transportation
Defendants.

DECISION AND ORDER

Plaintiffs Highway J Citizens Group, U.A. ("Citizens")[1] and Waukesha County Environmental

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[1] Citizens is an unincorporated association that "represents residents of Waukesha and Washington County who are concerned about

(continued...)

Action League ("WEAL")[2] filed this action alleging that federal governmental approval of a proposed highway project ("the County J/Highway 164 project") violates federal law. Specifically, pursuant to the Administrative Procedure Act ("APA"),[3] 5 U.S.C. §§ 701-06, plaintiffs challenge: (1) the March 6, 2002 Record of Decision ("ROD") of the Federal Highway Administration ("FHWA"), which authorized the use of federal funds under the Federal Aid Highway Act, as amended by the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101 et seq, in connection with the improvement and expansion of County J/Highway 164 between Interstate 94 and Highway 60 in Waukesha and Washington Counties;[4] and (2) the January 14, 2005 decision of the United States Army Corps of Engineers ("ACOE") to issue a permit under § 404 of

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(...continued)
the potential destruction of the region along STH 164 and CTH J with a WisDOT proposed 4-lane highway." (Compl. ¶ 10.) According to the complaint, "[t]here are approximately 8,000 members of Citizens, many of whom live along, and enjoy State Highway 164 in its present state." (Id.)

[2] WEAL is a nonprofit corporation "which has been dedicated since 1978 to protecting Waukesha County's natural resources." (Compl. ¶ 11.) WEAL has approximately 100 members, "the overwhelming majority of whom are residents of Waukesha County, including members who live along, and enjoy Highway 164 in its present state." (Id.)

[3] To assist the reader, I have attached an appendix of the acronyms used in this decision.

[4] The roadway expansion project is Wisconsin Department of Transportation ("WisDOT") Project I.D. 2748-01-01.

the Clean Water Act ("CWA"), 33 U.S.C. § 1344, allowing WisDOT to fill 9.27 acres of wetlands in connection with the County J/Highway 164 project.[5] Plaintiffs challenge the March 6, 2002 ROD on the ground that in reaching its decision the FHWA violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 - 4347, and the Federal Aid Highway Act, and they allege that the ACOE's decision to issue a § 404 permit violated the CWA.[6]

On March 17, 2005, plaintiffs moved for a temporary restraining order ("TRO") and a preliminary injunction and sought to prevent defendants from beginning construction on a particular phase of the roadway project, which was scheduled to begin in April. On March 21, 2005, the judge initially assigned to the case denied plaintiffs' motion for a TRO and ordered defendants to respond to plaintiffs' motion for a preliminary injunction on an expedited basis. Subsequently, the judge recused himself, and the clerk of court randomly reassigned the case to me. This decision and order addresses plaintiffs' motion for preliminary injunction.

I. STATUTORY OVERVIEW

The present case involves provisions of three federal statutes, NEPA, the Federal Aid Highway Act

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[5] The permit in dispute is permit number MVP-2004-157290-DJP.

[6] Additionally, the complaint contains passing references to the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11. However, none of the eight counts of the complaint alleges a WEPA violation, and plaintiffs indicate that they are not presently pursuing a WEPA claim.

and the CWA. Before turning to the facts of the case, I will outline the relevant provisions of these statutes.

A. NEPA

NEPA establishes a "'national policy [to] encourage productive and enjoyable harmony between man and his environment,' and was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the Untied States." Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2209 (2004) (quoting 42 U.S.C. § 4321) (alteration in original). NEPA does not mandate particular results in order to accomplish these ends but instead imposes procedural requirements on federal agencies, which compel them to "undertake analyses of the environmental impact of their proposals and actions." Id. In this regard, NEPA's core provision is its requirement that federal agencies:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C). The regulations interpreting NEPA call this detailed statement an Environmental Impact Statement ("EIS"). See 40 C.F.R. § 1508.11.[7] An EIS is prepared in two stages. First, the agency prepares a draft EIS and receives comments on it from federal and other government agencies and the general public. See id. §§ 1502.9(a) & 1503.1. Then, the agency prepares a final EIS ("FEIS") in which it responds to comments and discusses "any responsible opposing view which was not adequately discussed in the draft statement." Id. § 1502.9(b). Under certain circumstances, the agency may also be required to prepare a supplement to either its draft or final EIS. See id. § 1502.9(c).

Requiring an agency to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), serves two purposes. First, "'[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" Public Citizen, 124 S. Ct. at 2215 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)) (alteration in original). Second, "it 'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'" Id. at 2215-16. Thus, in an EIS discussing a federal agency's proposal, the agency must "articulate why [it has] settled upon a

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[7] NEPA established the Council of Environmental Quality ("CEQ") and provided it with authority to issue regulations interpreting NEPA. These regulations are codified at 40 C.F.R. §§ 1500 et seq.

particular plan and what environmental harms (or benefits) [its] choice entails." Simmons v. U.S. Army Corp of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997). The EIS must show that agency officials have "[thought] through the consequences of – and alternatives to – their contemplated acts," and must ensure that "citizens get a chance to hear and consider the rationales the officials offer." Id.

When an agency makes a decision after preparing and studying an EIS, the agency must memorialize that decision in a ROD. See 40 C.F.R. § 1505.2.

B. Federal Aid Highway Act

The Federal Aid Highway Act allows state governments to use federal funds in carrying out highway construction projects. See, e.g., Rothrock v. United States, 62 F.3d 196, 198 (7th Cir. 1995) (citing 23 U.S.C. §§ 101(b), 105(a) and 106(a)) . The Act imposes a number of procedural requirements upon projects that receive federal funding. The requirement involved in the present case provides that when a state's proposed highway project "involv[es] the bypassing of, or going through, any city, town, or village," the state must certify to the Secretary of Transportation that "it has had public hearings, or has afforded the opportunity for such hearings." 23 U.S.C. § 128(a). The purpose of this public hearing requirement is "to bring the planners face-to-face with public reaction to their proposals and projects." Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 125 (S.D. Ohio 1984).

C. Clean Water Act

The purpose of the CWA is "'to restore and maintain the chemical, physical, and biological integrity of the nation's waters.'" S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1251). To serve this purpose, the CWA "prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." Id. (quoting 33 U.S.C. § 1311(a)). The provision of the CWA at issue in this case is § 404, which requires an applicant to obtain a permit from the ACOE for the discharge of dredged or fill material into navigable waters of the United States, which include wetlands. 33 U.S.C. § 1344 (codification of § 404); 40 C.F.R. § 230.3(s)(7) (defining "waters of the United States" to include wetlands); Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1445 (1st Cir. 1992). Guidelines developed by the Environmental Protection Agency in conjunction with the ACOE govern the issuance of a § 404 permit. 33 U.S.C. § 1344(b)(1); Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1269 (10th Cir. 2004). These guidelines, known as § 404(b)(1) guidelines, are published in 40 C.F.R. Part 230. See Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1524-25 (10th Cir. 1992). The ACOE also has its own regulations that apply to the permit process, which are published in 33 C.F.R. Part 320. See Town of Norfolk, 968 F.2d at 1445. The § 404(b)(1) guideline relevant to the present case is 40 C.F.R. § 230.10(a), which provides that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have

other significant adverse environmental consequences."[8]

III. FACTS

In 1999, the FHWA and WisDOT began studying proposals to address existing and future transportation demand along the County J/Highway 164 roadway. They studied an area starting just north of I-94 on County J, running north along County J and Highway 164, and ending just north of where Highway 164 crosses County E. (See FEIS Ex. 2-9.)[9] Defendants state that they wish to improve the roadway to:

> • Improve safety by reducing conflicts between through and local traffic and providing a facility that meets current design standards for a principal arterial highway.
>
> • Provide a recommended plan that can be used by local governments as blueprint to guide future land use and development decisions, and to preserve land for future transportation improvements.

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[8] Thus, unlike NEPA, which does not mandate that an agency make any particular decision so long as it prepares an adequate EIS, the CWA and applicable regulations create substantive restrictions governing when the ACOE can issue a § 404 permit. See Greater Yellowstone Coalition, 359 F.3d at 1273-74; Sierra Club v. United States Army Corps of Eng'rs, 772 F.2d 1043, 1051 (2d Cir. 1985).

[9] The record includes portions of the FEIS. (See Exhibit A to March 18, 2005 Affidavit of Jeffrey M. Gonyo, and Defendants' Exhibits 1009 to 1019.)

> • Improve local and through traffic access to development and community services adjacent to County J/WIS 164 as well as to destinations outside the corridor.
>
> • Improve operational efficiency commensurate with the highway's function as a principal arterial and primary north-south route in northern Waukesha County and southern Washington County.
>
> • Accommodate traffic demand generated by existing and planned development along the County J/WIS 164 corridor as well as in the surrounding region.

(Id. at 1-2 to 1-3.) The FHWA and WisDOT decided to proceed with a proposal that involved expanding the County J/Highway 164 roadway from two to four lanes throughout the entire project area.[10] However, because the proposal was a "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), NEPA required the FHWA to prepare an EIS before approving the proposal. On April 9, 2001, FHWA and WisDOT prepared a draft EIS. The draft EIS listed the ACOE as a "cooperating agency." (See Defs.' Ex. 1003 at 1.) On May 30, 2001, WisDOT held what it considered a public hearing under 28 U.S.C. § 128(a), and on December 11, 2001, the FHWA and WisDOT issued a final EIS, again listing ACOE as a cooperating agency. The FEIS recommended the roadway expansion proposal, and the FHWA issued a ROD on March 6, 2002 in which it adopted that

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[10] The proposal involves improvements to the roadway other than expansion to four lanes, but the details are unimportant.

proposal. The agencies have commenced construction of the County J/Highway 164 project and completed the first phase in 2004. They began the second phase in April 2005, shortly after plaintiffs commenced the present action, and propose to commence a third phase in 2006. They have not scheduled construction in a large section of the project area that they are preserving for expansion to four lanes in the future, when the average daily traffic increases to the point where expansion to four lanes becomes necessary.[11]

The second phase of the project involves expanding a 3.8 mile segment of Highway 164 between Swan Road and Prospect Court to four lanes. (See Defs.' Ex. 1039.) Because WisDOT needed to fill wetlands considered "waters of the United States" as part of this phase, it applied to the ACOE for a permit pursuant to § 404 of the CWA. Upon receipt of WisDOT's application, the ACOE determined that the application failed to account for certain wetlands in the project area and asked WisDOT to account for these additional wetlands and supplement its application. WisDOT complied with the ACOE's request, and on December 30, 2004, the ACOE issued a decision in which it recommended that WisDOT's permit application be granted. On January 14, 2005, the average daily traffic ("ADT") exceeds 13,000. ACOE issued a permit authorizing WisDOT to fill 9.27 acres of wetlands as part of the second phase of the roadway expansion project.

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[11] Under WisDOT standards, a roadway must be expanded to four lanes when the average daily traffic ("ADT") exceeds 13,000.

Additional facts will be stated in the course of this decision.

III. STANDARDS OF REVIEW

Plaintiffs seek review of two final agency actions: the FHWA's March 6, 2002 ROD, and the ACOE's issuance of a § 404 permit to WisDOT on January 14, 2005. The APA provides the standard of review for plaintiffs' challenges to these decisions. See Highway J Citizens Group v. Mineta, 349 F.3d 938, 952 (7th Cir. 2003) (reviewing NEPA claim pursuant to APA); Greater Yellowstone Coalition, 359 F.3d at 1268 (stating that Corp's compliance with CWA is reviewed pursuant to APA); Coalition of Concerned Citizens Against I-670, 608 F. Supp. at 121-26 (applying APA in reviewing public hearing claim under Federal Aid Highway Act). Under the APA, a court may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This standard of review is narrow and requires that I "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." Highway J Citizens Group, 349 F. 3d at 952-53 (internal quotation marks and citation omitted). Thus, if

> an agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise[,]

the agency action must be set aside. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). With respect to plaintiffs' NEPA claims, I may not substitute my judgment regarding the environmental consequences of an action for that of the agency. Highway J Citizens Group, 349 F.3d at 953. However, I must "insure that the agency has taken a 'hard look' at environmental consequences." Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). In a suit under the APA, a district court sits as a reviewing court, much like an appellate court. Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443-44 (7th Cir. 1990). With few exceptions not relevant here, the court does not take new evidence or hold a trial or evidentiary hearing. Id. Instead, in reviewing the agency action, the court considers only matters within the administrative record. 5 U.S.C. § 706; Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). Because in reviewing plaintiffs' claims I am performing what is essentially an appellate role, a discussion of the proper treatment of plaintiff's motion for preliminary injunction is necessary. As the Seventh Circuit has stated, "the ultimate question to be decided when a plaintiff moves for a preliminary injunction is whether granting, or denying, the motion is the decision that will minimize the costs of error arising from the fact that the motion must be decided without a full hearing on the merits of the plaintiff's claim." Cronin, 919 F.2d at 444-45. Thus, entertaining a request for a preliminary injunction "assumes that the decision whether to grant or deny [the request] is preliminary to a full hearing on the plaintiff's claim." Id. at 445. But in typical APA cases, there will never be a hearing at all; thus, "considerations of irreparable harm are out the window and the only question is whether the plaintiff is entitled to an injunction, period." Id. In such cases, "[a]ll that the plaintiffs are

entitled to do in the courts is try to persuade the district judge and then [the court of appeals], on the basis of evidence that was before [the administrative agency at the time of its decision], that the decision is unlawful." Id. However, the Seventh Circuit has recognized that a district court may entertain a preliminary injunction motion in APA cases under certain circumstances. Id. at 446-47. One such circumstance is when the administrative record is incomplete when the motion is filed and irreparable harm will occur before the record is completed. Id. at 446.

In the present case, because I am limited to reviewing the administrative record, most likely I will never hold a hearing on the merits of plaintiffs' claims. However, the full administrative record has not been filed with the court as of the date of this decision, and I do not know whether plaintiffs have been able to review the full record and, if not, whether they intend to make additional arguments after they do so. Further, as discussed in more detail below, defendants have raised the affirmative defense of claim preclusion with respect to plaintiffs' challenge to the March 6, 2002 ROD under the APA, NEPA and Federal Aid Highway Act. In order to resolve the issue of claim preclusion, I must consider facts that are not part of the administrative record. If such facts are disputed, I may need to hold a hearing to resolve the dispute.[12] Accordingly, although motions for preliminary injunctions are usually inappropriate in APA cases, I

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[12] However, as explained below, plaintiffs do not appear to dispute any of the facts relating to defendants' claim preclusion defense. Thus, it is unlikely that I will need to hold a hearing on the issue.

conclude that the procedural posture of this case warrants such a motion.

Generally, the standard governing a motion for a preliminary injunction is as follows. The party seeking a preliminary injunction has the burden of demonstrating that it has a reasonable likelihood of success on the merits of its claims, that it has no adequate remedy at law, and that it will suffer irreparable harm without the preliminary injunction. See, e.g., AM Gen. Corp. v. DaimlerChrysler Corp., 311 F.3d 796, 803 (7th Cir. 2002). If the party seeking the injunction meets those burdens, the court then considers any irreparable harm that the injunction might impose upon the party against which the injunction is sought, and whether the preliminary injunction would harm of foster the public interest. Id. at 803-04. However, "[a] party with no chance of success on the merits cannot attain a preliminary injunction." Id. at 804.

IV. ANALYSIS

Plaintiffs challenge the FHWA's March 6, 2002 ROD on two grounds. First, they argue that the FHWA issued the ROD in violation of NEPA because the EIS prepared for the County J/Highway 164 project contained an inadequate discussion of the project's environmental impacts. Second, they argue that the FHWA issued the ROD in violation of § 128 of the Federal Aid Highway Act because it failed to hold a proper public hearing on the project. Plaintiffs also challenge the ACOE's decision to issue a § 404 permit in connection with the second phase of the project on the ground that the decision violated 40 C.F.R. § 230.10(a)'s prohibition on issuing a § 404 permit when there exists a "practicable alternative" to the proposed

project that would have "less adverse impact on the aquatic ecosystem."

As noted, besides resisting plaintiffs' claims on their merits, defendants argue that plaintiffs' challenge to the March 6, 2002 ROD is barred by claim preclusion. Thus, I consider first whether plaintiffs' challenge to the March 6, 2002 ROD is barred by claim preclusion. Because, as explained in Part A below I conclude that it is, I do not discuss the merits of such challenge. I discuss plaintiffs' challenge to the ACOE's decision to issue a § 404 permit, the only remaining issue, in Part B below.

A. Claim Preclusion

Generally, claim preclusion, also known as res judicata, bars a party from raising a claim that it raised or could have raised in previous litigation. See Nevada v. United States, 463 U.S. 110, 129-30 (1983). To show that a claim is barred by federal claim preclusion,[13] the party seeking to establish the defense must establish three elements: identity of claims, identity of parties or their privies, and a prior final judgment on the merits. See Perry v. Globe Auto Recycling, Inc., 227 F.3d 950, 952 (7th Cir. 2000); D & K Props. Crystal Lake v. Mut. Life Ins. Co. of N.Y., 112 F.3d 257, 259 (7th Cir. 1997). If the party establishes these elements, "claim preclusion bars not only those

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[13] The preclusive effect of a judgment rendered by a federal court depends on federal law. See, e.g., In the Matter of Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 767 (7th Cir. 2003) ("Bridgestone Tires"). Because the judgment at issue in the present case is a federal court judgment, I apply federal rather than state claim preclusion principles.

issues which were actually decided in a prior suit, but also all issues which could have been raised in that action." Kratville v. Runyon, 90 F.3d 195, 197-98 (7th Cir. 1996). In the present case, defendants claim that claim preclusion bars plaintiffs' claim that the March 6, 2002 ROD should be set aside because plaintiff Citizens (with whom, argue defendants, WEAL is in privity) challenged the same ROD in a previous case, Highway J Citizens Group U.A. v. Mineta et al., Case No. 02-C-0662 (E.D. Wis.) ("Citizens I"), which resulted in a judgment on the merits. I consider this argument below.[14]

1. Identity of Parties or Their Privies

The first element of claim preclusion is the identity of the parties or their privies in the two suits. In the context of claim preclusion, "privity" is difficult to define. It is essentially "a descriptive term for designating those with a sufficiently close identity of interests" such that applying claim preclusion to bar a party's claim is proper. Tice v. Am. Airlines, Inc., 162 F.3d 966, 971 (7th Cir. 1998). Privity is a fact-specific question: "whether there was (or should be implied at law) the kind of link between the earlier and later plaintiffs that justifies binding the second [plaintiff] to the result reached against the first." Id.

In the present case, there is no question that plaintiff Citizens and all of the relevant defendants were parties, or were in privity with, parties to Citizens

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[14] Because the parties do not dispute that Citizens I resulted in a judgment on the merits, I discuss only whether Citizens I and the present case involve the same parties and the same claims.

I.[15] However, plaintiff WEAL was not a party to Citizens I, and at oral argument on the present motion, I raised the question of whether WEAL was in privity with Citizens.[16] Defendants responded by arguing that WEAL was "virtually represented" by Citizens in Citizens I. (See Defs.' Supp. Br. [R. 28] at 17.) "Under the doctrine of virtual representation, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." In re L & S Indus., 989 F.2d 929, 933 (7th Cir. 1993). The Seventh Circuit views the doctrine of virtual representation not as a form of privity, but as a separate theory for applying claim preclusion to a party who was not a party to the relevant previous litigation. See Tice, 162 F.3d at 971. Viewed as a doctrine distinct from privity, the Seventh Circuit has disapproved of virtual representation. See Bridgestone Tires, 333 F.3d at 769; Perry, 227 F.3d at 953; Tice, 162 F.3d at 970-74. However, the Seventh Circuit has stated that the

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[15] Although the ACOE was not a party to Citizens I, the ACOE is a defendant in this case only in connection with its decision to issue a § 404 permit. Defendants do not argue that claim preclusion bars plaintiffs' challenge to the ACOE's decision to issue the permit. Thus, that the ACOE was not a party to Citizens I does not prevent claim preclusion from barring plaintiffs' challenge to the March 6, 2002 ROD.

Further, successors to public office are considered to be in privity with their predecessors. See, e.g., 18 James Wm. Moore et al., Moore's Federal Practice § 131.40[3][e] (3d ed. 2005). Thus, the fact that some of the named state officials in the present suit are successors in office does not prevent a finding that the parties are identical.

[16] As far as I can tell, plaintiffs do not dispute that they were in privity. However, because I raised this issue at oral argument, I will address it here.

doctrine is not "lifeless," Monfils v. Taylor, 165 F.3d 511, 521 (7th Cir. 1998), and applies its principles within the context of privity, Tice, 162 F.3d at 971. As the court stated in Tice, "[a] proper functional analysis of privity, focusing on the general question whether the earlier parties were in some sense proper agents for the later parties, [supports] preclusion in the cases that have used the lingo of virtual representation." Id.

Thus, to determine whether WEAL and Citizens were in privity, I must determine whether Citizens was in some sense a proper agent for WEAL in Citizens I. Whether preclusion is appropriate "depend[s] on how closely the two [parties'] sets of interests coincide and the role the absentees played in the earlier litigation." Id. at 973. "At a minimum . . . the claims and defenses of the two allegedly equivalent parties (earlier litigant, present litigant) must be the same." Id. Further, "there should be some indication not only that the second party was aware that the first litigation was going on and that the earlier litigation would resolve its claims, but also that the second party either had participated or had a legal duty to participate." Id.

Applying the above principles to the present case, I conclude that defendants have shown that WEAL was in privity with Citizens. First, as explained infra Part IV.A.2, the claims of Citizens in Citizens I and of WEAL and Citizens in the present case are identical. Second, Citizens and WEAL have identical interests in the suit, and had identical interests in Citizens I. That is, both are citizens groups opposed to the County J/Highway 164 project. See supra n.1 & n.2. Indeed, the complaint in the present case does not distinguish between the two groups when describing the interests of its members. (See Compl. ¶¶12-15.) Finally, there is more than "some indication" that

WEAL was aware that Citizens I was going on and that WEAL had participated in that case. WEAL's website contains a letter from Jeff Gonyo, a member of Citizens, describing the present lawsuit and soliciting donations from WEAL members to pay legal fees in connection with the suit. This letter demonstrates that WEAL and WEAL members knew of, and participated in, Citizens I. It states:

> For the past six years, WEAL has been a very strong supporter of our citizens's groups's [i.e., Citizens's] grassroots efforts to stop the Highway 164 four-lane expansion and their [i.e., WEAL's] Board of Directors has made many generous donations to help pay for our group's past legal fees. By joining our citizens group as a co-plaintiff in this current lawsuit, WEAL is promising to make a $1,000 donation to help out with our legal fees once again. We are very appreciative of WEAL's continuing support of our efforts.

(Defs.' Ex. 1043 at 4 (emphasis in original).) The letter concludes by "strongly encouraging" Citizens members to become members of WEAL. (Id.) Although this letter never specifically mentions Citizens I, the context of the letter makes clear that WEAL knew about, supported, and contributed to Citizens's legal expenses in Citizens I. At the least, that is what defendants have represented this letter as stating, and plaintiffs have not disputed such representation. Thus, because WEAL's and Citizens's interests are identical, and because WEAL knew about and participated in

Citizens I, I find that WEAL was in privity with Citizens.[17]

2. Identity of Claims

Defendants argue that in Citizens I, Citizens sought to set aside the March 6, 2002 ROD under the APA and that plaintiffs' current challenge to the same ROD under the APA is part of the same claim as the prior challenge. To evaluate defendants' argument, I must determine whether Citizens challenged the March 6, 2002 ROD in Citizens I and, if I determine that it did, determine whether plaintiffs' current challenge to the ROD is part of the "same claim."

a. Whether Citizens Challenged March 6, 2002 ROD in Citizens I

Predominantly, Citizens I involved a challenge under the APA to a WisDOT/FHWA project known as the "Ackerville Bridge project."[18] This project, which

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[17] Whether WEAL and Citizens were in privity is a question of fact, see Tice, 162 F.3d at 971 (stating that privity is a "fact-specific" question), on which defendants bear the burden of proof, see, e.g., ITOFCA, Inc. v. MegaTrans Logistics, Inc., 322 F.3d 928, 933 (7th Cir. 2003) (Ripple, J., concurring). However, as explained in the text, defendants have submitted undisputed evidence showing that WEAL and Citizens were in privity. Thus, for purposes of evaluating plaintiffs' motion for a preliminary injunction, I find that plaintiffs have no likelihood of showing that Citizens and WEAL were not in privity.

[18] The Ackerville Bridge project is WisDOT Project I.D. # 2748-01-00. A more detailed statement of the facts surrounding the project can be found in the Seventh Circuit's opinion in Citizens I. See Highway J Citizens Group, 349 F.3d at 941-63.

occurred on Highway 164 adjacent to the northern terminus of the County J/Highway 164 project, involved the construction of a bridge and the reconstruction of Lovers Lane Road in Washington County. The FHWA approved the Ackerville Bridge and County J/Highway 164 projects in separate RODs. Because WisDOT and FHWA viewed the Ackerville Bridge project as distinct from the County J/Highway 164 project, the EIS governing the latter project did not address the environmental impacts of the former. Further, WisDOT and FHWA did not prepare a separate EIS for the Ackerville Bridge project because they determined that the applicable regulations did not require one.[19]

Citizens raised three issues in Citizens I. First, it argued that WisDOT's and FHWA's decision to treat the Ackerville Bridge project and the County J/Highway 164 project as separate projects violated NEPA, the applicable regulations and the APA.[20]

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[19] CEQ and other agency regulations govern when an agency must prepare an EIS. Under the regulations, when a proposed action is neither one normally requiring an EIS nor one categorically excluded from the EIS process, the agency must prepare an environmental assessment ("EA"). Highway J Citizens Group, 349 F.3d at 953. An EA is a "shorter, rough-cut, low-budget EIS . . ., 'which provide[s] evidence and analysis that establish[es] whether or not an EIS or a Finding of No Significant Impact ('FONSI') should be prepared.'" Id. (quoting 40 C.F.R. § 1508.9(a)(1)) (alterations in original). A FONSI "briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." Public Citizen, 124 S. Ct. at 2210.

[20] In the terminology of NEPA case law, Citizens argued that the County J/Highway 164 project was improperly "segmented" from the Ackerville Bridge project . See Highway J Citizens Group, 349 F.3d at 962-63.

Citizens further argued that, even if the projects were legitimately distinct, the FHWA's decision to approve the Ackerville Bridge project without preparing an EIS had to be set aside under the APA. Highway J Citizens Group, 349 F.3d at 952-60. Finally, Citizens argued that the decision to approve the Ackerville Bridge project violated the APA because WisDOT and FHWA did not consider sufficient reasonable alternatives to the project, as required by NEPA. Id. at 960-62. The relief requested in Citizens I included enjoining the defendants from proceeding with further work on the Ackerville Bridge project, requiring the defendants to prepare an EIS for that project, requiring the defendants to prepare a FEIS "for all of the County J/Highway 164 project, including that portion consisting of" the Ackerville Bridge project, and "[p]reliminarily and permanently enjoining the defendants from widening County J/Highway 164 from I-94 in Waukesha County to STH 60 in Washington County from two to four lanes." (Citizens I Compl. at 13-14.)[21]

In the present case, plaintiffs argue that they did not challenge the March 6, 2002 ROD in Citizens I. Specifically, they argue that "while both [the Ackerville Bridge project and the County J/Highway 164 project] were indeed mentioned or referred to in that litigation, [Citizens I] concerned the plaintiff's challenges to one of the projects, that being the Ackerville Bridge project." (Pls.' Reply Br. [R. 23] at 3 (emphasis in original)). However, although Citizens never mentioned the March 6, 2002 ROD in Citizens I, it is clear that it

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[21] The Citizens I complaint is part of the record in the present case as Defendants' Exhibit 1021.

challenged that decision in that case when it argued that the County J/Highway 164 project was improperly segmented from the Ackerville Bridge project.[22] A claim that one project was improperly segmented from another is necessarily a claim that the environmental review conducted for each project was inadequate because each review failed to consider the environmental effects of the other project. Thus, a claim of improper segmentation is a claim that a court must set aside each decision approving the segmented projects under the APA because neither decision complied with NEPA and the applicable regulations and therefore both decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Accordingly, in Citizens I, by arguing that WisDOT and FHWA improperly segmented the County J/Highway 164 project from the Ackerville Bridge project, Citizens

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[22] Whether one highway project was improperly segmented from another is governed by a FHWA regulation, 23 C.F.R. 771.111(f)(1)-(3). See Highway J Citizens Group, 349 F.3d at 962. This regulation provides as follows:

> (f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:
>
> > (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
> >
> > (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
> >
> > (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. Id.

argued that (1) the ROD approving the Ackerville Bridge project had to be set aside under the APA because the FHWA failed to assess the environmental impacts of the project through an EIS that included the County J/Highway 164 project; and (2) the ROD approving the County J/Highway 164 project had to be set aside under the APA because the FHWA failed to assess the environmental impacts of the project through an EIS that included the Ackerville Bridge project. Indeed, Citizens must have recognized that success on their segmentation claim in Citizens I entailed the invalidation of the ROD which approved the County J/Highway 164 project because, in that case, Citizens sought to enjoin the County J/Highway 164 project and compel FHWA and WisDOT to prepare an EIS governing both projects. (See Citizens I Compl. at 13-14.)

Thus, I conclude that Citizens challenged the March 6, 2002 ROD in Citizens I.[23]

b. Whether Present Challenge to March 6, 2002 ROD is a Different "Claim."

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[23] In arguing that Citizens did not challenge the County J/Highway 164 project in Citizens I, plaintiffs rely on language in the Seventh Circuit's opinion in that case stating that the County J/Highway 164 project "is relevant to this litigation only because Citizens believes that it was improperly segmented from the Ackerville Bridge Project." Highway J Citizens Group, 349 F.3d at 942. However, as explained in the text, by bringing in the County J/Highway 164 project as part of its segmentation argument, Citizens necessarily challenged the FHWA's decision to approve the project. Thus, although Citizens challenged the County J/Highway 164 project in Citizens I "only because" it believed that it was improperly segmented, id., that does not mean that it did not, in fact, challenge such project.

Having determined that Citizens challenged the March 6, 2002 ROD in Citizens I, the question becomes whether plaintiffs' current challenge to the same ROD is the "same claim" for claim preclusion purposes. See, e.g., Herrmann v. Cencom Cable Assocs., Inc., 999 F.2d 223, 226-27 (7th Cir. 1993) (explaining that claim preclusion bars relitigation of the same claim). If two purported claims are really one, prior litigation of one such "claim" bars litigation of the second in a subsequent lawsuit. Id. However, as numerous courts and commentators have recognized, the standard for when two claims are so closely related that they are really the same is not precise. See, e.g., Colonial Penn Life Ins. Co. v. Hallmark Ins. Adm'rs, Inc., 31 F.3d 45, 447 (7th Cir. 1994); Herrmann, 999 F.2d at 226- 27; 18 Moore et al, supra, § 131.20 (stating that there is no bright line test for determining whether claim was subject of prior action and providing overview of various courts' approaches to the issue). The Seventh Circuit has "suggest[ed]" that "two claims are one for purposes of [claim preclusion] if they are based on the same, or nearly the same, factual allegations." Herrmann, 999 F.2d at 226. In other cases, the Seventh Circuit has examined whether the claims are part of the "same transaction" or involve a "single core of operative facts giving rise to a remedy." Doe v. Allied-Signal, Inc., 985 F.2d 908, 913 (7th Cir. 1993) (internal quotation marks and citation omitted). The court has also stated that "[o]nce a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost," and that "[a] plaintiff may not avoid an earlier judgment on the merits by merely concocting a new legal theory." Id. at 913-14 (internal quotation marks and citation omitted).

Although the applicable standard is imprecise, it is clear that under any of the above formulations, plaintiffs' present challenge to the March 6, 2002 ROD is the same claim as the claim that Citizens raised in Citizens I involving the same ROD. Both challenges involve "the same, or nearly the same factual allegations," arise out of the "same transaction," and involve a common "core of operative facts," i.e., the approval of the County J/Highway 164 project. Further, plaintiffs have advanced no persuasive reason for finding that their current challenge to the March 6, 2002 ROD should be viewed as a different claim. Essentially, plaintiffs argue that they should be able to challenge the March 6, 2002 ROD in the present case because they are challenging it for different reasons than Citizens did in Citizens I. That is, they argue that in Citizens I, Citizens challenged the ROD under NEPA on improper segmentation grounds, whereas in the present case, plaintiffs challenge the ROD on the ground that it violated NEPA in numerous other respects and § 128 of the Federal Aid Highway Act. However, accepting plaintiffs' argument would mean that the same party could bring successive APA challenges to the same agency decision so long as in each lawsuit the party raised a new reason for invalidating the decision. For example, a party could bring an initial suit raising improper segmentation under NEPA, a second suit raising a second NEPA violation, a third suit raising a third NEPA violation, a fourth suit raising a violation of § 128 of the Federal Aid Highway Act, a fifth suit alleging that the Federal Aid Highway Act is unconstitutional, etc. Allowing a party to bring such successive claims would defeat the value of finality that claim preclusion is designed to protect. See, e.g., Tice, 162 F.3d at 970 (explaining that claim preclusion serves the needs of litigants and the judicial system alike for finality of decisions after a full

and fair airing of the matter"); 18 Moore et al, supra, § 131.12[3][2] (explaining that the concept of finality is central to doctrine of claim preclusion). Thus, I cannot accept plaintiffs' argument that a party can bring successive challenges to the same agency decision as long as each successive challenge raises a new reason for overturning the decision.

Finally, plaintiffs seem to argue that because Citizens I was primarily about the Ackerville Bridge project, they should be able to raise new challenges to the County J/Highway 164 project in the present case. However, although Citizens I was primarily about the challenge to the Ackerville Bridge project, as explained above, Citizens also raised the County J/Highway 164 claim in its first suit.[24] And there is no exception to claim preclusion which allows parties to relitigate a claim on the ground that they only litigated that claim a little bit, or to a lesser extent than another claim, in their first suit. Rather, as long as the first suit provided the opportunity to fully litigate a raised claim (and plaintiffs here do not claim that Citizens was denied a full and fair opportunity to litigate the County J/Highway 164 claim in Citizens I), claim preclusion

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[24] Under the analysis set forth in the text, the challenge to the decision to approve the Ackerville Bridge project was a different claim than the claim involving the County J/Highway 164 project because the former arose out of a separate set of facts or a separate transaction than the latter. Thus, in Citizens I, Citizens raised two distinct claims for claim preclusion purposes <– the claim involving the County J/Highway 164 project and the claim involving the Ackerville Bridge project. Had Citizens confined itself to challenging the Ackerville Bridge Project in Citizens I, the judgment in that case would not preclude its challenge to the County J/Highway 164 project in the present case.

bars any subsequent relitigation. See Pirela v. Vill. of N. Aurora, 935 F.2d 909, 913 (7th Cir. 1991) (stating that claim preclusion bars party from litigating a claim if party had a full and fair opportunity to litigate claim in prior lawsuit).

Thus, for the reasons stated, I conclude that Citizens raised plaintiffs' present challenge to the March 6, 2002 ROD in Citizens I. Accordingly, because Citizens I and the present case also involve identical parties or their privies, and because Citizens I resulted in a judgment on the merits, I conclude that claim preclusion likely bars plaintiffs' present challenge to the March 6, 2002 ROD. Plaintiffs therefore have not shown a likelihood of success on the merits of their claim involving NEPA and the Federal Aid Highway Act, and their motion for preliminary relief based on such claim will be denied.

B. Clean Water Act

The § 404(b)(1) guidelines provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). A "practicable alternative" is one that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Id. § 230.10(a)(2). If a proposed project does not require access or proximity to or siting within wetlands to fulfill its basic purpose, i.e., if the project is not "water dependent," practicable alternatives are presumed to be available, "unless clearly demonstrated otherwise." See id. § 230.10(a)(3). Courts have held that

when a project is not water dependent, the ACOE "may not issue a § 404 permit unless the applicant, with independent verification by the [ACOE], provides detailed, clear and convincing information proving that an alternative with less adverse impact is impracticable." Greater Yellowstone Coalition, 359 F.3d at 1269 (internal quotation marks, alterations and citation omitted, emphasis in original). "This presumption of practicable alternatives is very strong." Nat'l Wildlife Fed'n v. Whistler, 27 F.3d 1341, 1344 (8th Cir. 1994) (internal quotation marks and citation omitted, emphasis in original). However, the Supreme Court has stated that "the concept of alternatives must be bounded by some notion of feasibility," and that:

> [c]ommon sense also teaches us that [a discussion of alternatives] cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that [a discussion] fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 551 (1978).

In the present case, the County J/Highway 164 project is not water dependent, and thus the presumption of existing practicable alternatives attaches, and the ACOE is required to "clearly demonstrate" that there are no practicable alternatives to the project. Plaintiffs contend that the ACOE has not met this burden because it failed to consider an

alternative that plaintiffs call the "Old Highway 164" alternative and because the ACOE's evaluation of alternatives involved an understatement of the amount of wetlands impacted by the County J/Highway 164 project.

1. Failure to Consider "Old Highway 164" Alternative

Plaintiffs contend that the ACOE has not clearly demonstrated that an "off-alignment alternative"[25] – which plaintiffs label "the Old Highway 164" alternative – is impracticable. (See Pls.' Letter Br. [R. 25] at 2-3.)[26] This alternative proposes routing traffic from I-94 to US 41-45 via Old Highway 164 and Highways VV, 74 and Y.[27] The route begins by taking

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[25] As the FEIS uses the phrase, "off-alignment alternatives" are alternatives that involve diverting traffic through roadways other than County J/Highway 164 so as to avoid the need to expand County J/Highway 164 to four lanes. (See FEIS at 2-4 to 2-5.)

[26] Initially, plaintiffs also argued that the ACOE failed to consider an alternative referred to as the "Power Line" or "Power Corridor" alternative. (See Pls.' Br. In Supp. [R. 7] at 25.) However, at oral argument, plaintiffs stated that they were no longer pursuing this argument. (Tr. at approx. 64.) (Citations to the transcript of the oral argument held on the present motion are approximate because the final transcript was not prepared at the time of this decision.)

[27] In describing this alternative, I rely on plaintiffs' description on page two of their letter brief [R. 25], and am comparing it with Defendants' Exhibit 1038. "Old Highway 164" is the roadway labeled "164" just east of the County J/Highway 164 project on Defendants' Exhibit 1038. To avoid confusion, I note that many other proposed alternatives to the County J/Highway 164 project incorporate Old Highway 164. However, references to "the Old Highway 164 alternative" in this decision are references to the alternative described in the text.

Old Highway 164, an existing four-lane highway, north to Highway VV. Traffic turns east on VV to Highway 74, takes Highway 74 to Highway Y, and then takes Highway Y to the US 41-45 interchange. The alternative involves widening Highways VV and 74 to four lanes; Highway Y would also be expanded to four lanes, but WisDOT has already decided to widen Highway Y as part of a different project, and thus only Highways VV and 74 would need to be widened to construct the Old Highway 164 alternative. Plaintiffs argue that this alternative would impact fewer wetlands than the County J/Highway 164 project but still serve the project's purposes.

Neither the FEIS or the ACOE's decision approving the § 404 permit contains a discussion of the Old Highway 164 alternative. However, the FEIS, on which the ACOE relied in analyzing practicable alternatives, considered and rejected a number of other off alignment alternatives involving Old Highway 164. (See FEIS Exs. 2-5, 2-6 & 2-8.) Further, plaintiffs have not cited to any part of the administrative record indicating that anyone ever brought the Old Highway 164 alternative to the ACOE's attention before it approved the § 404 permit. Although plaintiffs claim that "the Old Highway 164 alternative was raised at the first Project Advisory Committee meeting on Aug. 10, 1999" (Pls.' Letter Br. [R. 25] at 2), the portions of the record cited do not support this claim.[28] Plaintiffs

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[28] Specifically, plaintiffs cite page 8-2 of the FEIS, but I do not see any reference to what plaintiffs describe as the Old Highway 164 alternative on that page. Page 8-3 states that Citizens advocated an alternative that involved improving "the Old WIS 164/County Y/US 41
(continued...)

also state that the "failure to consider this alternative in the Draft EIS was objected to in public comments." (Id.) But again, the part of the record cited does not support the assertion.[29] Indeed, the plaintiffs did not make clear what they meant by "the Old Highway 164 alternative" until oral argument on the present motion and a letter they filed in response to the court's

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(...continued)
and US 45 corridor," but this could be a reference to what the FEIS discussed and described as the "County Y Corridor" alternative. (See FEIS at 2-15 & Ex. 2-8.) Plaintiffs also cite paragraph nine of Gonyo's initial affidavit [R. 7, attachment #1] in support of their contention that they raised the Old Highway 164 alternative during the EIS process, which states that "[a]s early as the first Project Advisory Committee meeting on August 10, 1999, . . . the agency was asked to consider maintaining highway J/164 as an improved 2-lane highway and improving 'Old Highway 164' as an alternative to the proposed project." However, almost every off-alignment alternative involved maintaining County J/Highway 164 as an improved two-lane highway and improving Old Highway 164. (See FEIS Exs. 2-5, 2-6 & 2-8.) Thus, Gonyo's affidavit does not indicate that anyone raised the Old Highway 164 alternative during the EIS process, as opposed to one of the other alternatives involving Old Highway 164.

[29] Specifically, plaintiffs cite DOT313WIS of Defs.' Ex. 1007 in support of their assertion. This document states that "WisDOT also failed to consider expanding old Highway 164 to 74 to Highway Y, a possibly less disruptive alternative." However, like the FEIS and Gonyo Affidavit, this document does not go into sufficient detail so as to distinguish what plaintiffs refer to as the Old Highway 164 alternative from other alternatives involving Old Highway 164 which defendants considered, such as the County Y Corridor alternative. In any event, even if this document is specific enough to distinguish the Old Highway 164 alternative from other similar alternatives, it does not explain why that alternative warranted separate discussion. Instead, it simply asserts that the Old Highway 164 alternative was "possibly less disruptive."

question about what they meant. (See Pls.' Letter Br. [R. 25] at 2.) Prior to oral argument, defendants and I thought plaintiffs' references to the Old Highway 164 alternative were references to the County Y Corridor alternative. (See Defs.' Br. in Opp. [R. 19] at 25; Tr. at approx. 65-68.) Thus, as far as the record reveals, no one brought the Old Highway 164 alternative and its potential advantages over the selected alternative to the ACOE's attention before it decided to issue the § 404 permit.

Because no one brought the Old Highway 164 alternative to the ACOE's attention during the permit review process, the ACOE's failure to demonstrate that this alternative was impracticable does not render its decision to issue a § 404 permit to WisDOT arbitrary and capricious. As stated, the § 404(b)(1) guidelines do not require the ACOE to rule out every conceivable alternative, "regardless of how uncommon or unknown that alternative may have been at the time the project was approved." Vt. Yankee, 435 U.S. at 551. Based on the present record, the Old Highway 164 alternative appears to have been unknown to the ACOE at the time it decided to issue the permit. The study area of the County J/Highway 164 project involved numerous alternative streets (see FEIS Ex. 2-9), the various combinations of which could have provided a large number of alternative routes. The ACOE cannot be expected to evaluate every possible combination of streets and explain why each individual alternative route is impracticable as compared to the selected alternative. See id. (stating that "[t]ime and resources are simply too limited to hold that [a discussion of alternatives] fails because the agency failed to ferret out every possible alternative").

Perhaps if the Old Highway 164 alternative were obviously superior to the chosen alternative, the ACOE's failure to rule it out could be deemed arbitrary and capricious even though no one brought it to the ACOE's attention and explained its advantages. However, the record contains no indication that the Old Highway 164 alternative was obviously superior. Although plaintiffs believe that the alternative would have met all of the project's goals while impacting fewer wetlands, the record suggests a number of possible problems with the route. First, to construct plaintiffs' alternative, WisDOT would have had to construct an expensive railroad crossing, which would have increased the project's cost. (See Defs.' Ex. 1046 at 6.) Second, the FEIS indicates that off-alignment alternatives similar to the Old Highway 164 alternative would not have met the goals of the project because they were "inconsistent with regional and county transportation system plans that document the importance of County J/WIS 164 as a major north-south arterial and the need for capacity expansion" on that roadway. (FEIS at 2-15.) Thus, the Old Highway 164 alternative was not an obvious alternative that the ACOE should have discussed even though no one proposed it.

Accordingly, for the reasons stated, I conclude that the ACOE's failure to discuss the Old Highway 164 alternative did not render its decision to issue a § 404 permit arbitrary and capricious.

2. Understatement of Wetlands Impacts

According to plaintiffs, the FEIS states that the second phase of the County J/Highway 164 project will

impact 5.27 acres of wetlands.[30] However, the § 404 permit issued to WisDOT allows it to fill 9.27 acres of wetlands as part of the second phase, a difference of four acres. Plaintiffs argue that although the ACOE recognized that the FEIS understated the wetlands impacts of the County J/Highway 164 project, it nonetheless relied on the FEIS's comparison of alternatives in conducting its practicable alternatives analysis. Plaintiffs state that this rendered the ACOE's consideration of practicable alternatives inadequate because such consideration did not take into account the actual wetlands impacts of the County J/Highway 164 project when comparing it to the alternatives.

However, as stated, the § 404(b)(1) guidelines prohibit the ACOE from issuing a permit for a project if there is a practicable alternative that will have "less adverse impact on [wetlands], so long as [that alternative] does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). The FEIS's understatement of the amount of wetlands impacted by the County J/Highway 164 project only affects one part of this alternatives analysis, i.e., whether an alternative will have a less adverse impact on wetlands than the applicant's preferred alternative. It does not affect whether an alternative is practicable or whether it will have other adverse environmental consequences. Thus, the ACOE's reliance on the four-acre understatement in the FEIS would matter only if it rendered the ACOE's conclusion that a particular

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[30] Plaintiffs represent that phase two will impact the wetlands listed as W-6 to W-16 on Table 4-12 on page 4-37 of the FEIS. (Pls.' Br. in Supp. [R. 7] at 18-19.) By my calculation, that means that the FEIS represents that phase two will impact 5.27 acres of wetlands.

practicable alternative would impact more wetlands than the County J/Highway 164 project erroneous. However, the ACOE did not reject any practicable alternative on the ground that it impacted four or fewer acres of wetlands more than the County J/Highway 164 project. The only alternatives that the ACOE rejected, even partly, on the ground that such alternatives impacted more wetlands than the County J/Highway 164 project, impacted at least five additional acres of wetlands.[31] Specifically, the FEIS stated that Alternative 3F impacted at least 6.5 acres of wetlands more than the County J/Highway 164 project (FEIS at 2-9), that Alternative 3G impacted at least 5 acres more (id. at 2-9 to 2-10), that the Power Corridor alternative impacted at least 43 acres more (id. at 2-14), and that the WIS 16 Corridor alternative impacted 11 acres more (id. at 2-16). Reducing the difference between each of these alternatives and the County J/Highway 164 project by four acres results in each alternative still impacting more acres of wetlands than the project – 2.5, 1, 39 and 7 acres, respectively.

Thus, even assuming that plaintiffs are correct and that the FEIS understated the amount of wetlands impacted by the County J/Highway 164 project by four

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[31] The ACOE did not reject any alternative solely because it impacted more acres of wetlands than the County J/Highway 164 project. Instead, the ACOE rejected the alternatives for a combination of reasons, including that they did not meet project goals (i.e., were impracticable) and had other adverse impacts. (See generally FEIS Section 2.) Thus, even if the four-acre understatement would have resulted in an alternative impacting fewer wetlands than the County J/Highway 164 project, the ACOE would not necessarily have acted arbitrarily and capriciously in issuing a § 404 permit for phase two construction.

acres, using the proper acreage in comparing alternatives would not have revealed a practicable alternative having a less adverse impact on wetlands. Accordingly, the ACOE's reliance on the FEIS as part of its practicable alternatives analysis did not render its decision to issue a § 404 permit arbitrary and capricious. Plaintiffs' challenge to this decision therefore fails.[32]

V. CONCLUSION

For the reasons stated, I conclude that claim preclusion likely bars plaintiffs' challenge to the March 6, 2002 ROD based on the APA, NEPA and the Federal Aid Highway Act. Plaintiffs therefore do not have a reasonable likelihood of success on the merits of this claim, and I will deny their motion for preliminary relief. Further, I conclude that plaintiffs' challenge to the ACOE's decision to issue § 404 permit to WisDOT fails and that plaintiffs therefore have no likelihood of success on this claim. These conclusions most likely resolve this case. However, as noted, because the administrative record was not complete as of the date

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[32] Plaintiffs also criticize the ACOE's reliance on the wetlands delineation provided by WisDOT in determining the overall amount of wetlands in the project area. Specifically, plaintiffs claim that WisDOT's delineation was outdated. However, the ACOE considered not just WisDOT's five-year-old information, but also more recent information contained in the ACOE's files. (See Defs.' Ex. 1026.) Further, the ACOE considered and rejected plaintiffs' expert's criticism of WisDOT's wetlands delineation. (See Defs.' Ex. 1031 at 35- 36.) Thus, because the ACOE did not "uncritically accept[]" WisDOT's wetlands delineation, Friends of the Earth v. Hintz, 800 F.2d 822, 835-36 (9th Cir. 1986), I conclude that the ACOE's use of such delineation was not arbitrary and capricious.

of this decision, and because plaintiffs may want to present evidence contradicting defendants' evidence showing that WEAL and Citizens are in privity, I will consider whether to permit further proceedings. Thus, I will schedule a telephonic conference to determine whether further proceedings are necessary or whether final judgment should be entered.

THEREFORE, IT IS ORDERED that plaintiffs' motion for a preliminary injunction is **DENIED**.

IT IS FURTHER ORDERED that a telephonic status conference will be held on **May 18, 2005 at 10:30 a.m. CDT.** The court will initiate the call.

Dated at Milwaukee, Wisconsin, this 27 day of April, 2005.

/s/
LYNN ADELMAN
District Judge

APPENDIX

ACOE: United States Army Corps of Engineers
ADT: Average Daily Traffic
APA: Administrative Procedure Act
CEQ: Council on Environmental Quality
CWA: Clean Water Act
EA: Environmental Assessment
EIS: Environmental Impact Statement
FEIS: Final Environmental Impact Statement
FHWA: Federal Highway Administration
FONSI: Finding of No Significant Impact
NEPA: National Environmental Policy Act
ROD: Record of Decision
TRO: Temporary Restraining Order
WEAL: Waukesha County Environmental Action League
WEPA: Wisconsin Environmental Policy Act
WisDOT: Wisconsin Department of Transportation

In the
United States Court of Appeals
For the Seventh Circuit

(349 F.3d 938)

No. 03-2644

HIGHWAY J CITIZENS GROUP,
Plaintiff-Appellant,

v.

NORMAN MINETA, in his official capacity as Secretary, United States Department of Transportation; FREDERICK WRIGHT, in his official capacity as Executive Director, Federal Highway Administration; THOMAS E. CARLSEN, in his official capacity as Acting Secretary, Wisconsin Department of Transportation,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 02 C 662—**Charles N. Clevert, Jr.**, *Judge.*

ARGUED SEPTEMBER 19, 2003—DECIDED NOVEMBER 5, 2003

Before BAUER, RIPPLE and WILLIAMS, *Circuit Judges.*

RIPPLE, *Circuit Judge.* On July 3, 2003, the Highway J Citizens Group ("Citizens") filed this action

pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; regulations implementing NEPA; and the Wisconsin Environmental Policy Act ("WEPA"), Wis. Stat. § 1.11 & Wis. Adm. Code ch. TRANS § 400 et seq. The named defendants were Norman Mineta, in his official capacity as Secretary of the United States Department of Transportation ("U.S. DOT"); Frederick Wright, in his official capacity as Executive Director of the Federal Highway Administration ("FHWA"); and Thomas E. Carlsen, in his official capacity as Acting Secretary of the Wisconsin Department of Transportation ("WDOT") (collectively "defendants").[1]

Citizens challenged the Ackerville Bridge/Lovers Lane Project, Project #2748-01-00 ("Ackerville Bridge Project") and the County J/Highway 164 Project, Project #2748- 01-01 ("County J/Highway 164 Project"). According to the Comp laint, a "contamination plume" containing arsenic and trichlorethylene ("TCE") is migrating toward the site of the Ackerville Bridge. Among other things, Citizens asked the district court (1) to enjoin the FHWA and WDOT from proceeding with the Ackerville Bridge Project until the location and extent of the contamination plume was determined, (2) to order the FHWA and WDOT to pump grout around the perimeter of pilings that have been driven into the ground to support the Ackerville Bridge, and (3) to require the FHWA to prepare an Environmental Impact Statement ("EIS") for the Ackerville Bridge Project. On June 12, 2003, the United

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[1] The FHWA, the federal agency in this case, worked in consultation with WDOT, the funding applicant, in performing the tasks required by NEPA. *See* 23 C.F.R. § 771.119.

States District Court for the Eastern District of Wisconsin denied Citizens' motion for a preliminary injunction and then ruled against Citizens on the merits. On June 13, 2003, the district court denied Citizens' expedited motion for stay pending appeal.

Citizens filed its notice of appeal on June 17, 2003. It then asked this court for an emergency injunction to prevent the opening of the Bridge. This court denied the requested relief, but granted Citizens' motion for an expedited appeal. In this appeal, Citizens seeks (1) a permanent injunction requiring closure of the Ackerville Bridge until grout is pumped around the pilings, (2) an EIS of the Ackerville Bridge Project, and (3) a revised EIS of the County J/Highway 164 Project that encompasses the area of the Ackerville Bridge Project and a permanent injunction prohibiting the County J/Highway 164 Project from proceeding until the revised EIS is completed. For the reasons set forth in this opinion, we must deny Citizens the requested relief and affirm the judgment of the district court.

I

BACKGROUND

A. Facts

There are two projects at issue in this case; both are "major federal action[s]" as defined in 40 C.F.R. § 1508.18. Highway J Citizens Group is an unincorporated association of residents of Waukesha and Washington Counties in Wisconsin who are "committed to preserving the beauty, tranquility, and environment of the area." R.1 at ¶ 1. Specific to this litigation, Citizens also includes persons "who live in the area of the proposed Ackerville bridge and whose

water supply is threatened with contamination from arsenic and TCE as a result of the proposed Ackerville bridge project." R.1 at ¶ 1. Thus, Citizens' focus in this case is Project #2748-01-00, the Ackerville Bridge Project. Project #2748-01-01, the County J/Highway 164 Project, is relevant to this litigation only because Citizens believes that it was improperly segmented from the Ackerville Bridge Project.

1. The Ackerville Bridge Project (Project # 2748-01-00)

There are three purposes for the Ackerville Bridge Project. The "primary purpose" is to address safety considerations flowing from the layout of the roads and the close proximity of the railroads. R.38, Ex.1003, A.R. at 00004. Another purpose is to bring the existing facility into compliance with State Trunk Highway standards, which govern the necessary requirements for a road to support truck traffic. *Id.* At 00013. A "secondary purpose" is to provide for future expansion of the roadways due to increasing traffic in the region. *Id.* at 00004. To affect these purposes, the plan provides

> an overpass structure . . . to be built at the Wisconsin Central Limited and the Wisconsin Southern Railroads in order to remove the existing at-grade crossings. The Sherman Road/Fond du Lac Drive connection would also be located under this structure. An additional overpass would be provided at State Highway 175.

Id. at 00012.[2]

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[2] A Project map is attached as Exhibit A.

The environmental assessment ("EA") for this Project was signed by various state and federal officials between October 29, 1999, and December 12, 1999, and was open for public comment from February 22, 2000, to April 7, 2000. *Id.* at 00004. The EA as originally published did not contain a discussion of the former waste disposal facility ("landfill") near the Project that was owned by Waste Management Company of Wisconsin, Inc. This landfill is located about 2,000 feet northwest of Ackerville and is leaking "landfill leachate" which has contaminated the underlying groundwater that flows from the landfill. As the contaminated groundwater flows, the contamination can spread or disperse, and this dispersed contamination is known as "contamination plume."

The effect of this contamination plume on the Ackerville Bridge Project was brought to the attention of the defendants by Jeffrey Gonyo, a member of Citizens, sometime during, and possibly before, February of 2000. R.38, Ex.1013, A.R. at 00838 (Wade e-mail); R.38, Ex.1005, A.R. at 00146-00147 (draft "Fact Sheet/Topics of Interest"). Defendants' initial conclusion was that the contamination plume did not raise significant concerns in relationship to the Ackerville Bridge Project. For example, in a February 21, 2000 document entitled "Fact Sheet/Topics of Interest," defendants stated:

> • The Waste Management Landfill-Hazardous Materials. If there is contamination in the shallow groundwater, couldn't the structure pilings create a "channel" to contaminate [sic] the deep groundwater where our drinking water comes from?:

> • *Acknowledge that both Wisconsin Department of Natural Resources and WDOT are aware of the concerns relating to the Polk Landfill. You can thank Mr. Gonyo for helping to bring the issue to the forefront.*
>
> • *WDOT will be addressing the contaminant concerns relating to the STH 164 project as part of the Phase 1 hazardous materials assessment. The assessment will evaluate [W]DNR documents about the landfill and assess what impact may be associated with the highway project activities. The WDOT will coordinate with the WDNR as needed. The report will include any recommendations that may be needed to address [hazardous materials] concerns.*
>
> • *The Phase 1 Assessment Report will become a public document available for review.*
>
> • *Though preliminary assessment of available information has led* [sic] *both [W]DNR and WDOT to think there are not likely to be significant project hazmat concerns related to the Polk Landfill, it would be premature to make definitive statements until the Phase 1 report is completed.*

R.38, Ex.1005, A.R. at 00143-00144 (italics in original). A previous, draft version of that document, dated February 15, 2000, addressed the environmental question posed as follows:

> • *This landfill was closed in the 1980's. Since that time, extensive monitoring and remediation has taken place. There has been some concern*

> *regarding the ground water contamination spreading in the direction of Lovers Lane Road. However, the project requires limited excavation in the area (footing for substructure units of the bridge) and encounters with ground water is unlikely.*

R.38, Ex.1008, A.R. at 00146. In a March 14, 2000 letter from Ken Wade, Hazardous Materials Engineer for the Environmental Team, Transportation District 2 of WDOT, to EMCS Design Group, Mr. Wade noted:

> I've attached copies of the latest landfill data collected by Waste Management. It clearly confirms that the concentration of [TCE] nearest the project area is decreasing and stable. The groundwater monitoring well nearest the project corridor is TW23R, located approximately 400 feet west of CTH J. TCE concentrations in well TW23R have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 5 ug/l.
>
> The water table for this region is approximately 30 feet below the ground surface. If construction plans for the footings require only 4 to 5 feet of excavation, it is very unlikely that contaminated groundwater will impact the project.
>
> It is also unlikely that project pilings or water detention/ infiltration basins will cause an impact on plume movement or concentrations.

R.38, Ex.1009, A.R. at 00728.

At the March 23, 2000 public hearing on the Ackerville Bridge Project, Mr. Gonyo testified in

opposition to the Project. Among other things, he identified the landfill as a source of contamination that the Project threatened to aggravate. With the aid of numerous exhibits, he testified that: (1) the Project goals could be accomplished by simpler and less costly means, (2) the Ackerville Bridge Project should not be segmented from the County J/Highway 164 Project, and (3) the landfill contaminants pose great risks in conjunction with the Project.

On April 7, 2000, the "Hazardous Materials Site Investigation Report Phase I Addendum" ("Addendum") was released. R.38, Ex.1015, A.R. at 00709-00714. This Addendum was prepared by the EMCS Design Group, which worked in connection with the WDNR in developing the report. The Addendum is based on a review of the March 30, 1990 report entitled "Two-Year Ground Water Monitoring Report Polk Sanitary Landfill Washington County, Wisconsin." This report discusses the groundwater around the landfill, including its flow, contains maps and discussions of arsenic and TCE, and concludes that the landfill was not the source of downgradient TCE detections or elevated arsenic levels. R.38, Ex.1000, A.R. at 02774-02814. The 2000 Addendum is also based on a review of the "Phase I and Phase II Hazardous Material reports," R.38, Ex.1014, A.R. at 00873-00908, which "were completed in 1994 for this project based on" the originally conceived limited scope of the Project, which did not include a bridge. R.38, Ex.1015, A.R. at 00710. The "February 23, 1994 Phase I Report" identified groundwater in the area as potentially contaminated and noted that WDNR was continuing to monitor it. It added, "The groundwater depth should be determined within the project limits so that excavation to the groundwater depth during construction can be

avoided." R.38, Ex.1014, A.R. at 00876. In the Addendum, the landfill is addressed as follows:

> *Site 7* (previous): Town of Polk/Waste Management (WDNR FID # 267062400) was identified in the original phase I report as an inactive waste disposal site. There is groundwater contamination in this area with [TCE] being one of the contaminants. The closest monitoring well is located approximately 400 feet west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 5 ug/l. This site is 700 feet west of where the proposed Foxboro extension connects to STH 175 and indicated groundwater depths of 30 feet are well below the excavation limits of the roadway. Therefore, it is very unlikely that the contaminated groundwater will impact this project. It is also unlikely that the pilings for the structure supports or retention basins will cause an impact on plume movements or concentrations.

R.38, Ex.1015, A.R. at 00714.

On April 25, 2000, the last signature was placed on the "Finding of No Significant Impact" ("FONSI") for the Project. The FONSI was premised on the EA for the Project, which was attached to the FONSI. The final EA/FONSI contains a "Basic Sheet A" which includes the comments from the public on the Project and defendants' responses to the comments. Specifically, Basic Sheet A considers whether the landfill "is a significant impact and therefore warrants preparation of an EIS," but concludes the landfill "will not affect the Department's proposed project." R.38, Ex.1003, A.R. at 00005. It explained:

> There is ground water contamination in the area sur- rounding the landfill with [TCE] being one of the contaminants. This site has been under remediation for several years. The closest monitoring well is located approximately 122 m (400 ft) west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 6 ug/l. Indicated ground water depths of 9m (30 ft) are well below the excavation limits of the roadway or bridge construction.
>
> The Department has determined that the potential for encountering and impacting hazardous materials during construction of this project does not exist. Therefore, there is no purpose or need for preparation of an EIS.

Id. The EA/FONSI also responded to Citizens' suggestion that the Ackerville Bridge Project and the County J/Highway 164 Project be joined together as one EIS. After considering the three criteria for segmentation set out in FHWA regulations, *see* 23 C.F.R. § 771.111(f)(1)-(3), it concluded that "the selected alternative has logical termini, independent utility, and does not preclude or exclude future alternatives for other projects. It is therefore appropriate that [the Ackerville Bridge Project] be allowed to stand on its own merit." *Id.* at 00004. The EA/FONSI also considered alternatives, including the alternative proposed by Citizens, but concluded that the best alternative to effectuate all of the purposes of the Project includes the Ackerville Bridge. *Id.* At 00006, 00013.

On July 7, 2000, Mr. Gonyo sent a letter to Paul Tufts, an environmental specialist at the FHWA, requesting that the defendants reconsider the FONSI and that an EIS be prepared before any construction on the Project. This letter specifically notes as a concern that "the pilings will have to be driven into and below the contaminated groundwater table." R.38, Ex.1017 at 2. According to the defendants, Richard Madrzak of the FHWA requested information from Jay Waldschmidt of the WDOT, Bureau of Environment, to respond to Mr. Gonyo. R.29 at 10. During their oral conversation, Mr. Waldschmidt discussed previous conversations with Chad Czarkowsi and Phil Fauble of WDNR, and then Mr. Madrzak asked to have something in writing. *Id.*

On August 22, 2000, the WDNR provided the WDOT a memorandum, per the request of Mr. Waldschmidt, in response to the groundwater concerns. R.38, Ex.1020, A.R. at 12294. The authors of the memo are Chad Czarkowski and Phil Fauble, both of whom have extensive experience with groundwater issues with WDNR. This 2 ½ page, singlespaced memo has as its main conclusion that "the road project will not have any substantial effect [sic] on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to ground water contamination in the vicinity." *Id.* at 12295. In support of that conclusion, the memo noted that

> [t]he TCE seems to originate from a point approxi- mately 1500 feet west / northwest of Hwy 164 and Sherman Road. Groundwater flow has been determined to be southeasterly from the apparent source, towards the proposed road project. The top of the water table in the gravel aquifer below the road project area is approximately 30 feet below the land surface.

Id. As to the concentrations of TCE, the memo stated that in the mid-1980s, area wells had been tested for TCE, and levels exceeded Wisconsin's enforcement standard of 5 ug/l. *Id.* However, the landfill "is not considered a likely source of the TCE plume because TCE has not been detected in either the landfill leachate or consistently in monitoring wells directly adjacent to the landfill." *Id.* The memo further noted that the private wells determined to be at risk from the waste disposal sites were sampled in the 1980s, and they were subsequently either abandoned altogether, abandoned and replaced with "deeper dolmite aquifer wells cased to the top of the first bedrock at 220 feet," or sampled and found clean. *Id.*

Finally, the memo considered three mechanisms by which the project could conceivably affect groundwater in the vicinity. The one relevant to this appeal is: "Driving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater." *Id.* at 12296. On this issue, the memo concluded that

> such vertical steel pilings would not, in themselves, contribute any additional contaminants to the ground- water, nor significantly alter flow along any horizontal plane. Theoretically, the flow of groundwater could be altered along vertical lines due to penetration of a piling thru lenses or layers of dense, clay-rich soil known as "confining layers" or aquatards. Such layers, if present, normally act to prevent downward or upward movement of groundwater. A piling might compromise a confining layer by creating a narrow (0.5"-3" maximum) concentric space along the outside shaft of a piling or casing.

> However, we believe the placement of pilings will not significantly affect ground water conditions on this project. As documented by well logs and soil borings, there is no effective, continuous confining layer in the project area. Without any effective separation of the shallow sand and gravel aquifer from the deeper dolomite aquifer, ground water already moves freely along vertical planes. In fact, several well-nests near the proposed project record consistent upward gradients, an indication that deeper aquifer water is discharging into the shallower system. The relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement.
>
> In conclusion, there does not appear to be any mech- anism by which the existing groundwater conditions will be significantly altered by the road project.

Id. at 12296-12297. On August 23, 2000, Mr. Madrzak sent an e-mail to Paul Tufts, the addressee on Mr. Gonyo's letter requesting reconsideration of the FONSI, discussing the August 22, 2000 memo:

> Attached for your information is a copy of DNR's response to my request through Jay Waldschmidt for information regarding Mr. Gonyo's allegation that the project will have a significant effect on the environment with regard to hazardous materials.

> The DNR note confirms the information contained in the revisions to the Environmental Assessment. The FONSI remains valid despite Mr. Gonyo's objections. We will respond accordingly to his request for FHWA to withdraw approval of the FONSI.
>
> His other concerns regarding segmentation are adequately discussed in the revisions to the EA.

R.11, Ex.5 (attached e-mail). On August 24, 2000, the FHWA sent a letter to Mr. Gonyo responding to his July 7, 2000 letter. In accord with Mr. Madrzak's e-mail, this letter concludes that the April 2000 FONSI/EA remains valid and meets the intent and requirements of NEPA.

Citizens expressed its concerns to the United States Environmental Protection Agency ("U.S. EPA") in various petitions in the first five months of 2000, and on August 28, 2000, the WDNR sent a letter to Jan Pels of the U.S. EPA explaining its conclusions regarding the extent of the contamination plume and the Project's effect on the plume. R.38, Ex.1023, A.R. at 10166-10171. The letter concluded that "[t]here is no evidence that existing private water supply wells are being impacted by groundwater." R.38, Ex.1023, A.R. at 10171. As to the Project, it stated in full: "The WDNR has also determined that the proposed WDOT road expansion and bridge project on STH 164 will not have an adverse impact on the ground water in the Ackerville area. The rationale for this determination is detailed in the attached memo from WDNR to WDOT." *Id.* On January 12, 2001, the U.S. EPA sent Mr. Gonyo a letter regarding his request for an investigation of the Waste Management landfill. The letter stated that the WDNR is in the process of "preparing a Sampling and

Analysis Plan for a [Site Inspection] of the Old Town Dump site." R.38, Ex.1024, A.R. at 10164-10165. This "Old Town Dump site" is a landfill just south and across the tracks from the Waste Management landfill, and the WDNR and U.S. EPA believed this landfill may be the actual source of the contamination. *Id.* at 10164.

On January 22, 2001, John E. Thresher, Jr., Citizens' groundwater expert, provided Fauble with criticisms of WDNR's groundwater analysis at the Waste Management landfill. This report discussed the extent and source of the TCE, concluding a "reasonable case can be made" the Waste Management landfill is the source. R.39, Ex.1025, A.R. at 12301-12304, 12307-12308. It also discussed arsenic, which the report explained was in the vicinity of the landfill and migrating toward Ackerville, and explained that the degree and extent of arsenic is not known due to various factors. The letter concluded with a strong request that an EA be performed to address these concerns. The letter did not discuss the Ackerville Bridge Project.

On February 26, 2001, EMCS Design Group issued a report officially acknowledging the pilings for the Project would extend below groundwater level. On July 10, 2001, a public hearing was held regarding WDOT's petition to the Office of the Commissioner of Railroads of the State of Wisconsin ("OCR") for alteration and closure of crossings for purposes of the Ackerville Bridge Project. At this hearing, Mr. Gonyo and other citizens testified about their concerns regarding the environmental impacts of the Project, and Mr. Thresher, Citizens' expert, testified as to his conclusions. Mr. Bauman of WDOT also testified. On July 11, 2001, Mr. Thresher sent a follow-up letter to the hearing examiner at the OCR hearing. In that

letter, he restated his position that contaminated water is moving towards Ackerville and that "[d]riving pilings through such sediments may disrupt the contaminant distribution thereby potentially contaminating additional private wells within Ackerville." R.39, Ex.1028, A.R. at 14559-14560.

In an e-mail dated July 26, 2001, Mr. Bauman of WDOT referenced a June 2001 article in *Civil Engineering* analyzing the environmental impact of pilings placed into contaminated soil entitled "Deep Foundations on Brownfield Sites." This article concluded, among other things, that "driven piles can be used on even 'brownfields' sites without causing adverse environmental effects. However, the proper type(s) of piles must be selected to avoid such effects . . . such as steel and possibly concrete to avoid internal flow." R.39, Ex.1030, A.R. at 13833. Mr. Czarkowski of the WDNR, one of the authors of the August 22, 2000 memo that found the pilings would have only an insignificant effect on the groundwater, responded to Mr. Bauman by e-mail: "When I first reviewed the environmental concerns regarding this project as part of the team here at DNR, I was aware that pilings would be driven below depths of 30 feet, which is where the groundwater occurs. We do not dispute that a very low level of [TCE] may exist in the groundwater." R.39, Ex.1031, A.R. at 13827. Mr. Czarkowski went on to state that his opinion that the pilings would not in any way affect groundwater flow was based on the assumption the pilings would be filled with solid material. He wanted to ensure that such was the case so he could maintain his opinion, memorialized in the August 22, 2000 memo, that the pilings "should not provide a significant pathway for migration of groundwater." *Id.* Mr. Bauman responded to Mr.

Czarkowski on August 27, 2001, and confirmed that the pilings would be filled with concrete. *Id.*

On September 20, 2001, the WDOT attended a meeting called by Wisconsin State Representative Suzanne Jeskewitz to discuss Mr. Gonyo's testimony at the OCR hearing. WDOT's "Public Communication Record" described the meeting in its "Discussion Summary":

> Began to discuss parts of Mr. Gonyo's testimony (13 points), but only completed first one on project cost and bridge size. Discussion then went to John Thresher's statements on potential impact of bridge piling on local groundwater contamination. Mr. Thresher states that in his opinion the WisDNR did not do a sufficient amount of study to determine the location of the contaminants and that the bridge piling could transfer the contamination to area wells.

A.R. at 10453. In the "Point Made" section of the Record, it stated in relevant part: "WisDOT did not agree with Mr. Thresher's assertion that contaminated groundwater in the area could be impacted by our project. WisDNR has told WisDOT that pilings from the proposed structure will not cause contamination to spread to neighboring wells." *Id.*

On October 19, 2001, the OCR issued a final decision granting the petition of the WDOT to alter and close the railroad tracks in the vicinity of the project. In its final report, the OCR laid out the pilings issue and WDOT's analysis of the issue, as supported by WDNR. It concluded: "The environmental issues raised by the opponents have already been adequately addressed by the environmental assessment done by DOT. Requiring another EA or a full EIS would only serve to delay an

important safety project without any likely environmental benefit." R.39, Ex.1027, A.R. at 14112.

On October 24, 2001, WDOT and WDNR representatives attended the follow-up meeting to the September 20, 2001 meeting held by Rep. Jeskewitz regarding the contamination and environmental effects of the project. One of the Public Communication Records in the record includes a "Discussion Summary" which described the substance of the meeting:

> SURE expert John Thresher's position:
>
> • Alleges that groundwater contamination plumes (TCE and Arsenic) are approaching STH 164.
>
> • Contends that pilings from new bridges would be a mechanism for contaminated groundwater to enter area wells (offered no proof).
>
> • Believes that Waste Management Landfill is source of contamination.
>
> • Wants groundwater monitoring wells installed in STH 164 right-of-way to determine if contamination is present.
>
> • If contamination is not within right-of-way, pilings will not cause contamination to enter area wells. WisDNR's position:
>
> • Site has been monitored since about 1980. Contamination is present in shallow groundwater.

- Mr. Thresher's information is based on 1986 data, which is considered suspect.

- Based on existing site conditions, pilings could not be a mechanism for the contaminated groundwater to enter area drinking wells.

- There is no proof that contamination is migrating towards STH 164. Appears that concentration of contamination is reducing as expected.

- There is no definitive evidence that Waste Management Landfill is source of contamination.

- Don't believe monitoring wells are needed and can't legally make Waste Management install them.

- Recommend continued testing of private drinking water wells and replacement if problem occurs.

WisDOT's position:

- Have support from all the required agencies and have followed all environmental requirements.

- Concur with WisDNR's position on pilings.

- Cited article in ENR Magazine of study done by University of New Orleans that displacement piles would not likely form conduits for contamination transfer (we are using cast-in-place concrete piling—a displacement pile).

> Rep. Jeskewitz and Sen. Darling will send letter to WisDOT requesting installation of monitoring wells in STH 164 right-of-way.

A.R. at 10440. In the next "Point Made" section of the Record, it stated: "WisDNR and WisDOT believe there is adequate proof to indicate that contamination has not migrated to the STH 164 right-of-way nor will contamination in excess of Health Advisory Limits ever migrate to the right-of-way. Further, pile driving will not cause migration even if contaminants are present." *Id.*

On November 16, 2001, Mr. Gonyo sent a letter to Terrence Mulcahy, then-Secretary of the WDOT. *Id.* at 10586. This letter discussed a Town of Polk resolution opposing the Ackerville Bridge Project and requested that the Project be immediately ended. *Id.* A December 3, 2001 letter from Secretary Mulcahy responded by acknowledging the opposition but noting that safety is the primary goal of WDOT and the bridge option provides for the best effectuation of safety and other goals for the Project. *Id.* at 10587- 10588.

On December 11, 2001, the WDOT received another inquiry from Wisconsin State Representative Michael (Mickey) Lehman asking whether there was any plan to clear up the contamination plume and whether additional testing was possible. The WDOT responded on December 21, 2001, recognizing the concern but concluding:

> The DNR has stated that the driving of piling into the groundwater will not cause contamination to migrate into area wells. Based on these statements from the DNR, our position is that if drinking water

well contamination occurs, it will not have been caused by our project and would fall under the jurisdiction of the DNR. Therefore, I am forwarding your letter to Charles Krohn, Southeast Region Water Leader, DNR, and asking that they respond to your questions, since they are experts on handling groundwater contamination.

Id. at 10575.

On December 13, 2001, the U.S. EPA sent a letter to Mr. Gonyo responding to his letter explaining the "Resolution of the Town of Polk Electors Opposing the Ackerville Bridge" Project and the County J Project. This letter stated that based on the information it had received from WDNR, WDOT and FHWA, U.S. EPA believed the potential contamination issues had been addressed adequately in the respective EA and EIS for these projects. *Id.* at 10477. The letter also responded to Mr. Gonyo's request for a Federal Superfund cleanup of the entire landfill area west of Ackerville, Wisconsin. In that regard, the letter noted that the environmental investigation report that U.S. EPA conducted on the site revealed no direct contact threats to the soil at the site and that there is no observed release of groundwater that can be attributed directly to the site. *Id.* "Therefore, the U.S. EPA did not recommend further investigation of the subject landfill." *Id.*

Another public meeting on the contamination plume was held on January 30, 2002, at which State Representatives and Senators requested installation of monitoring wells in Ackerville. In a February 4, 2002 document entitled "Summary of the Groundwater Contamination in the Ackerville Area Washington County, Wisconsin," Mr. Thresher again concluded that the contamination threatened Ackerville residents and

discussed the pilings. On February 26, 2002, a document entitled "Public Health Assessment for Ackerville Area Groundwater" was released by the Wisconsin Department of Health and Family Services, Division of Public Health, on behalf of WDNR, the Washington County Health Department, and the Agency for Toxic Substances and Disease Registery. The Assessment concluded: "There is no relationship between the proposed bridge construction project and area groundwater quality. The groundwater is 30 feet below the ground surface and will not be affected by the bridge or road construction." R.38, Ex.1039, A.R. at 10154.

On February 27, 2002, then-WDOT Secretary Gene E. Kussart sent letters to the various state Representatives and Senators who had requested testing at the January 30, 2002 meeting, stating: "Although the [WDOT] has conformed to all environmental requirements for this project and [WDNR] and [FHWA] have indicated that our improvement project will not impact the groundwater, I have decided to accommodate your request." R.39, Ex.1036, A.R. at 10545-10548. These wells were installed by STS Consultants in the vicinity of the Project for the purpose of "determin[ing] potential impacts of upgradient groundwater contaminant sources on areas of bridge pile support installation." R.39, Ex.1038, A.R. at 10086. In an April 8, 2002 memorandum to "Files," Mr. Bauman of WDOT noted the wells should be installed before construction and tested within a week of installation and quarterly for two years thereafter. The memo also noted:

> WisDOT intends to turn over the results of all tests to the WisDNR for their use. It is our opinion that the WisDNR will be responsible to

> pursue and oversee any actions needed in response to the test results. The WisDOT, Dept. of Health and Family Services and the WisDNR all believe this project will not impact the groundwater in the project area whether contamination is present in the right-of-way or not. Therefore, we expect that regardless of what is found in the tested wells the project will not be delayed or changed in any way.

R.39, Ex.1039A, A.R. at 10119. In an e-mail dated April 24, 2002, Mr. Wade of WDOT reached the following conclusion based on the initial sampling results from the new monitoring wells:

> The confirmation of permeable aquifer materials, upward hydraulic gradients, low contaminant con- centrations, and lack of any apparent contaminant source in the immediate project area all reinforce our earlier conclusion that the project activities, including the driving of piles, will have no significant impact on the continuing migration of the contaminants in the project area. No modification of the highway project should be required.

R.39, Ex.1040, A.R. at 10079. In a May 2, 2002 memorandum from Mr. Fauble of WDNR to Mr. Wade of WDOT, Mr. Fauble stated that, per Mr. Wade's request, he had reviewed the initial monitoring data and that none of the data contradict his and Mr. Czarkowski's August 22, 2000 memo. Specifically, he noted that TCE levels were well below state enforcement standards, there were no detects of arsenic, and there were very low VOC detects.

Construction began on the Project in May of 2002, including the insertion of the pilings. On May 15, 2002, the U.S. EPA sent a letter to U.S. Senator Russ Feingold of Wisconsin concluding that the "U.S. EPA has determined that the Ackerville project will not significantly impact groundwater quality." A.R. at 10474-10475. On June 25, 2002, the U.S. EPA sent "a follow-up letter" to a June 5, 2002 meeting that included Mr. Gonyo, other citizens and U.S. EPA staff. The letter noted that EPA staff "confirmed and reiterated" its position in the June 5th meeting that the "U.S. EPA does not believe that the Ackerville project will significantly alter long-term groundwater quality in this area," and the letter also stated the agency does not believe sufficient reason exists to change its position. R.48 at 2.

By the time Citizens filed this lawsuit on July 3, 2002, 150 of the 177 pilings (84%) necessary for the Project already had been inserted. On November 21, 2002, Mr. Bauman of WDOT sent a memorandum with the new monitoring well results. R.39, Ex.1046 at 1. The memo noted that TCE levels were well below detectable limits, arsenic levels had increased in two wells but were well below the DNR Prevention Action Limit, and that WDOT continued to believe the Project would not have a significant effect on the groundwater in Ackerville. *Id.*

2. County J/Highway 164 Project (Project # 2748-01-01)

On April 9, 2001, a final Environmental Impact Statement ("EIS") was approved by the FHWA for the County J/Highway 164 Project for distribution to agencies and the public. On March 6, 2002, the FHWA adopted the selected alternative that was set forth in the EIS for "WisDOT Project I.D. 2748-01-01." R.39,

Ex.1045 at 12. This alternative "widen[s] County J/WIS 164 on its present alignment, and incorporates the existing roadway as part of the ultimate 4-lane facility." *Id.* at VI. The Project extends for approximately 18 miles and abuts the Ackerville Bridge Project at its northernmost end. *Id.* at IV. The key objectives for this road-widening project include providing for increasing traffic demands and addressing safety concerns due to the traffic and current inadequacies of the roadway. *Id.* at IV-VI.

B. District Court Proceedings

On June 12, 2003, the district court denied Citizens' motion for a preliminary injunction and ruled against Citizens on the merits. Before turning to the merits, the district court determined that the standing requirement was satisfied by at least some of Citizens' individual members, as well as the association itself. It also held that Citizens' claims were not moot or barred by the doctrine of laches because Citizens had filed after 150 of the 177 pilings (84%) necessary for the Ackerville Bridge Project were already in the ground. Both of these issues were thoroughly and correctly analyzed by the district court, and we shall not further discuss them.

As to the merits, the district court first determined that, overall, the defendants had taken the requisite "hard look" at the environmental consequences of the Project. Second, the court held that the defendants had considered sufficiently reasonable alternatives and had "made a fully informed decision to proceed with the alternative involving the overpass structure." R.52 at 54. Finally, the court determined that the defendants made a "reasonable decision in establishing the project termini" and that the Ackerville Bridge Project had not

been improperly segmented from the County J/Highway 164 Project. *Id.* at 56.

II

DISCUSSION

A. "Hard Look" at Environmental Consequences

This court's review of agency action under NEPA is governed by the APA. *See Indiana Forest Alliance, Inc. v. United States Forest Serv.*, 325 F.3d 851, 858 (7th Cir. 2003). The APA instructs courts to set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Under this standard, our inquiry is "searching and careful" but "the ultimate standard of review is a narrow one." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotations and citations omitted). We only must ask "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* "If an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Indiana Forest Alliance*, 325 F.3d at 859. In the context of NEPA, arbitrary and capricious review prohibits a court from "substitut[ing] its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). In fact, "[t]he only role" for a court in applying the arbitrary and capricious standard in the NEPA context "is to insure that the agency has taken a 'hard look' at environmental consequences." *Id.*

NEPA sets forth a broad national commitment to protecting and promoting the environment. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Like the APA, NEPA "does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.* (internal citations omitted). One process required under NEPA is that all federal agencies must prepare an "environmental impact statement" ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also Heartwood, Inc. v. United States Forest Serv.*, 230 F.3d 947, 949 (7th Cir. 2000). This report is "a detailed analysis and study conducted to determine if, or the extent to which, a particular agency action will impact the environment." *Heartwood*,
230 F.3d at 949.

In evaluating whether an EIS is necessary, Council on Environmental Quality ("CEQ") regulations instruct that the term "significantly" in the statute requires consideration of both "context" and "intensity." 40 C.F.R. § 1508.27(a)-(b). Intensity in turn requires agencies to consider, among other factors, "the degree to which the proposed action affects public health and safety"; "the degree to which the effects on the quality of the human environment are likely to be highly controversial"; and "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." *Id.* § 1508.27(b)(2), (4), (5).

These considerations are often spelled out in the preliminary stages of a proposed project in an environmental assessment ("EA"). An EA is a shorter, rough-cut, lowbudget EIS which is mandated when, as here, proposed action is neither one normally requiring an EIS nor one categorically excluded from the EIS process. *See* 40 C.F.R. § 1508.9; 23 C.F.R. § 771.115(c); *Indiana Forest Alliance*, 325 F.3d at 856. Among other information, it "provide[s] evidence and analysis that establish[es] whether or not an EIS or a Finding of No Significant Impact ('FONSI') should be prepared." 40 C.F.R. § 1508.9(a)(1); *see also Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998).

In this case, Citizens alleges that the defendants failed to take a "hard look" at the environmental consequences of the Ackerville Bridge Project and that an EIS is required for the Project under NEPA and its implementing regulations. In assessing these contentions, we must, as a threshold matter, state with precision the question at issue. Both parties agree there are contaminants in the groundwater in the general
vicinity of the Ackerville Bridge Project. They disagree as to the source of the contaminants and the extent of the threat posed by the contaminants. Citizens claims the source is the Waste Management landfill. The defendants are not sure what the precise source is. Citizens claims the levels of contaminants are unsafe. The defendants believe they are not. Regardless of the source and extent of the contaminants, the key question is whether there is a nexus between the Ackerville Bridge Project, which the defendants are implementing and which NEPA and its regulations govern, and the *preexisting* contamination in the general vicinity, which, apart from the Project, NEPA and its regulations do not affect.

In this action, the only possible mechanism by which Citizens claims the Project will exacerbate this preexisting condition is through the bridge pilings. In their view, when driven into the groundwater, the pilings will create a zone of permeability that will allow the contaminants to flow to the private drinking water of Ackerville citizens. Thus, the narrow question before us is whether the pilings needed for the bridge will advance or exacerbate the migration of contaminated water toward private wells in the Ackerville area.[3]

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[3] Citizens puts a great deal of emphasis in its argument on the allegation hat the defendants did not adequately determine the source and extent of the contamination, especially the extent of arsenic, before proceeding with a finding of no significant impact and with construction. *See, e.g.*, Appellant's Br. at 28, 31-32, 36-37. As a threshold matter, we note that the defendants did explore the levels of contamination both before and after the April 2000 EA/FONSI enough to determine that there was preexisting contamination, at least in small amounts, and to determine that the Project itself did not threaten to exacerbate the contamination without some mechanism to advance it toward the Ackerville drinking water. *See* R.38, Ex.1003, A.R. at 00002; R.38, Ex.1015, A.R. at 00714; R.38, Ex.1020, A.R. at 12295. Nevertheless, Citizens' argument misses the point. Again, we emphasize that the defendants' liability under NEPA and its implementing regulations rests on a nexus between their Project and the preexisting contamination. If the Project has no significant effect on the contamination, the contamination is still a problem, but it is a problem that does not fall under the jurisdiction of the FHWA and WDOT. Rather, it falls under the U.S. EPA and WDNR which are charged with maintaining the quality of groundwater for our citizens. In fact, both in relation to and apart from this Project, the U.S. EPA and WDNR have been monitoring the contamination and its effect on the groundwater in Ackerville for some time. *See* R.38, Ex.1024, A.R. at 10164-10165; A.R. at 10476-10477.

Citizens, through its expert, Mr. Thresher, claim that "the coarse grains along the boundaries of the driven pilings would rotate due to the shearing thereby increasing the porosity, and consequently the permeability, of the sands and gravels near the pilings." Appellant's Br. at 34. This is the principle of dilatancy, and in this case, it means the driving of pilings will create a zone of permeability (a space that chemicals can pass through) around the outside of the pilings that would allow contamination from lower levels to migrate upward and eventually into private drinking wells and water. *Id.* Defendants through their experts at the WDNR disagree and instead believe that the "relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement." R.38, Ex.1020, A.R. at 12295. Again, we emphasize that we do not approach this dispute as a panel of environmental experts attempting to decide which party is correct. We only review whether the agencies charged with carrying out this project took a "hard look" at the relevant information and consequences and made an informed judgment.

In sum, NEPA requires agencies to take a "hard look" at the environmental consequences *of their projects*. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). If an agency's project does not *itself* "significantly" affect the environment, then neither NEPA nor its implementing regulations require an agency to perform an EIS or to remedy a preexisting environmental problem merely because the project happens to take place in the vicinity of that preexisting environmental problem. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508 (discussing "effects" which "are caused *by the action*") (emphasis added).

The April 2000 EA/FONSI for the Ackerville Bridge Project does not contain a specific discussion of the effects of the pilings. Rather, it discusses the required excavation, noting it will not reach the groundwater, and concludes: "The Department has determined that the potential for encountering and impacting hazardous materials during construction of this project does not exist. Therefore, there is no purpose or need for preparation of an EIS." R.38, Ex.1003, A.R. at 00005. Other contemporaneous documents do contain general conclusions that the pilings will have no effect on the contamination. For example, the Addendum to the Phase 1 Report, also released in April of 2000, states without elaboration that it is "unlikely the pilings for the structure supports . . . will cause an impact on plume movement or concentrations." R.38, Ex.1015, A.R. at 00714. Likewise, Mr. Wade, a Hazardous Materials Engineer for WDOT, concluded in a March 14, 2000 letter that "it is also unlikely that project pilings or water detention/infiltration basins will cause an impact on plume movement or concentrations." R.38, Ex.1009, A.R. at 00728. Although based on the evidence in the record, we believe the defendants knew the pilings would extend into the groundwater when the April 2000 EA/FONSI was issued,[4] there is no "hard look" analysis to support

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[4] The first, official, public acknowledgment that the pilings would extend into the groundwater was an EMCS report dated February 26, 2001. However, the defendants explain that they had assumed before the issuance of the April 2000 EA/FONSI that the pilings would extend below the groundwater, and though ambiguous, the most plausible inference from the record is that they in fact made that assumption. For example, the defendants asked the question in a "Fact Sheet/Topics of Concern" dated February 15, 2000: "If there is contamination in the shallow groundwater, couldn't the structure pilings create a (continued...)

the conclusion reached by the defendants that the pilings would not have a significant effect. Indeed, the defendants appear to acknowledge there was not a "hard look" analysis of the effect of the pilings in April of 2000; instead, the defendants rely on the post-EA/FONSI, August 22, 2000 memo of their experts at the WDNR as the basis for their "hard look." *See* R.29 at 11 (defendants' answers to district court's questions) ("The specific question as to how the pilings would

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(...continued)
'channel' to contaminate [sic] the deep groundwater where our drinking water comes from?" R.38, Ex.1008, A.R. at 00146. In a March 24, 2000 letter from Ken Wade of WDOT to EMCS, Mr. Wade stated:

> The water table for this region is approximately 30 feet below the ground surface. If construction plans for the footings require only 4 to 5 feet of excavation, it is very unlikely that contaminated groundwater will impact the project.
>
> *It is also unlikely* that project pilings will cause an impact on plume movement or concentrations.

R.38, Ex.1009, A.R. at 00728 (emphasis added). This language is mirrored in the April 2000 Addendum. R.38, Ex.1015, A.R. at 00714. Furthermore, just months after the issuance of the April 2000 EA/FONSI, Mr. Gonyo wrote a letter to the FHWA requesting reconsideration of the FONSI, and this letter stated: "[T]he pilings will have to be driven into and below the contaminated groundwater table." R.38, Ex.1017 at 2. Finally, the WDNR was involved in this Project well before the issuance of the April 2000 EA/FONSI, *see* R.38, Ex.1003, A.R. at 00005 (Basic Sheet 2) (discussing "extensive coordination" with the WDNR in finding no significant impact), and Mr. Fauble of WDNR later noted in a correspondence: "When I first reviewed the environmental concerns regarding this project as part of the team here at DNR, I was aware that pilings would be driven below depths of 30 feet which is where the groundwater occurs." R.39, Ex.1031, A.R. at 13827.

affect groundwater and more particularly, the movement of arsenic and TCE was *fully addressed after the FONSI* on a number of occasions by various persons.") (emphasis added); Appellees' Br. at 49 (stating that "the timing of the final determination of the depth that the pilings would extend into the ground is of little relevance based upon the findings the WDNR reached in its August 22, 2000, memorandum").

After the issuance of the final EA/FONSI, Mr. Gonyo requested reconsideration of the defendants' decision in his July 7, 2000 letter to the FHWA. One concern specifically raised is that "the pilings will have to be driven into and below the contaminated groundwater table." R.38, Ex.1017 at 2. The FHWA and WDOT were responsive to Mr. Gonyo's request and solicited the help of the experts at the WDNR in reevaluating the Project's impacts, including the effect of driving the pilings into the groundwater table, in order to respond to Mr. Gonyo. This exchange resulted in the August 22, 2000 WDNR memorandum authored by Mr. Czarkowski and Mr. Fauble, which states that "[d]riving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater." R.38, Ex.1020, A.R. at 12296. However, the memo goes on to conclude that the "relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement." *Id.* at 12297. As required by NEPA, this conclusion was "based on a consideration of the relevant factors," *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotations and citations omitted), specifically, the makeup of the soil into which the pilings were to be driven, R.38, Ex.1020, A.R. at 12296. It also was not "clear error of judgment." *Marsh*, 490 U.S. at 378

(internal quotations and citations omitted). Finally, the conclusion was arrived at by the defendants' experts, on which they were entitled to rely to the exclusion of Citizens' expert. *Id.* ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."). At this point, the defendants had taken a "hard look" and were in full compliance with NEPA and its regulations.

Although we could stop here, we have gone to great lengths in reciting the facts to demonstrate that from August of 2000 to the beginning of the construction in May of 2002, the defendants did not ignore Citizens' concerns. Rather, the defendants attended meetings with state legislators in which Citizens' representatives expressed their concerns, responded to Citizens' various requests for information and reconsideration, ultimately agreed to install private monitoring wells to study the contamination despite the belief the Project would have no significant impact on the contamination, and reviewed, and had the WDNR review, the results of the initial monitoring from the newly installed wells and any effects those results might have on the Project. In addressing Citizens' concerns, the defendants and WDNR also worked with other agencies including the U.S. EPA, Wisconsin OCR, and the Wisconsin Department of Health and Family Services, all of which confirmed the defendants' conclusion that the Project would not significantly affect the groundwater contamination. To be sure, the defendants did not change their position as result of Citizens' requests and challenges, but they were not required to do so. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (stating that NEPA "simply prescribes

the necessary process" but "itself does not mandate particular results" (citations omitted)).

In taking a hard look at the environmental consequences, the the defendants also made a reasoned determination that an EIS was not required. As noted previously, an EIS is only required for "major Federal actions *significantly* affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). According to CEQ regulations, "significantly" requires an agency to consider the "context" and "intensity" of a project's environmental consequences. *See* 40 C.F.R. § 1508.27(a)-(b). Citizens claims the defendants failed to consider three factors that CEQ regulations instruct agencies to "consider[]" under the intensity prong. *See id.* § 1508.27(b). First, it claims the defendants failed to consider "the degree to which the proposed action affects public health and safety." *Id.* § 1508.27(b)(2). The defendants, however, did consider this factor but found the Project, and specific to this litigation, the pilings, would have an insignificant effect. This factor must also be read in the context of the regulation's instruction that agencies consider "[i]mpacts that may be both beneficial and adverse." *Id.* § 1508.27(b)(1). The defendants found not only that the negative environmental impacts of the Project were insignificant, but also that the Ackerville Bridge Project was the best way to solve serious safety problems with the current roadway facility.

The defendants also did not fail to consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial." *Id.* § 1508.27(b)(4). Citizens has met its initial burden of establishing that the Project was highly controversial, as we recently defined that term in *Indiana Forest Alliance, Inc. v. United States Forest Service*, 325 F.3d

851, 858 (7th Cir. 2003) ("[T]his factor considers whether there is a substantial dispute about the size, nature or effect of an action in the relevant community."). However, that is only the first step in the analysis. As we further explained in *Indiana Forest Alliance*, if the plaintiff meets the initial burden,

> the agency must consider the dispute and address the concerns in its final decision. This two-step approach recognizes that as long as the agency has taken a "hard look" at the relevant issues involved in the preparation of an EIS and satisfactorily explained its subsequent decision, the agency decision should not be set aside.

Id. at 858. In this case, the defendants did just that. *See* R.38, Ex.1020, A.R. at 12295-12296; R.38, Ex.1022, A.R. at 06225. The mere fact that there is still disagreement or that Citizens' expert disagrees with the defendants' experts does not render the defendants out of compliance under this factor. *See Indiana Forest Alliance*, 325 F.3d at 861 (citing multiple cases for the proposition that scientific dispute does not render an agency's action arbitrary and capricious).

Finally, the defendants considered "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). Although they acknowledged uncertainty as to the *source and extent of the threat of the contaminants* to the Ackerville area, they found with certainty that the *Project's effects* on the contamination and environment were insignificant. That conclusion was informed and reasoned, and thus cannot be second-guessed. *See Marsh*, 490 U.S. at 378. In summary, we hold that the defendants took a "hard look" at the environmental

consequences and in doing so, made an informed and reasoned determination that no EIS was required for the Project.

Before moving on, we must address one last contention by Citizens. Citizens argues that this analysis is faulty because, temporally, our "hard look" analysis should extend only to April of 2000, when the defendants formally issued the EA/FONSI. The defendants did not stop with the issuance of the EA/FONSI, however, and we believe neither should our analysis. First, we do not believe this runs afoul of the administrative record requirement. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The "hard look" inquiry is focused on "the full administrative record that was before the Secretary *at the time he made his decision*." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Although the *formal* "decision" of no significant impact was made at the time of the April 2000 EA/FONSI in this case, the defendants reconsidered their position pursuant to the July 7, 2000 request of Mr. Gonyo. With the analysis of the experts at the WDNR, as memorialized in the August 22, 2000 memo, the defendants took a "hard look" at the consequences of the pilings and made a further "decision" that the EA/FONSI was valid and thus there was no need to withdraw the documents. Mr. Madrzak of the FHWA emailed Mr. Tufts of the FHWA, the addressee of Mr. Gonyo's request, following completion of the August 22, 2000 memo: "The DNR note [August 22, 2000 memo] confirms the information contained in the revisions to the Environmental Assessment. The FONSI remains valid despite Mr. Gonyo's objections. We will respond accordingly to his

request for FHWA to withdraw approval of the FONSI." R.11, Ex.5 (attached e-mail).

The purpose of confining judicial review to the administrative record is to ensure that agencies adequately evaluate their proposed course of action *before* they act and do not simply attempt to justify rash, uniformed actions through " '*post hoc* rationalizations" once they are aware they are being sued. *Citizens to Preserve Overton Park*, 401 U.S. at 419 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)). The defendants in this case did not begin construction until May of 2002 and were not informed they were being sued until about the same time. *See* R.52 at 40-41. Therefore, the documents in the record that were developed in the months following the issuance of the April 2000 EA/FONSI, including the August 22, 2000 memo, were analyzed approximately a year and a half before the defendants even knew they were being sued and took the action, the construction, in dispute. These documents establish that in reconsidering the decision to release the EA/FONSI, the defendants did indeed take a "hard look" at the possibility of increased contamination caused by the pilings. This is not the kind of post-hoc rationalization the Supreme Court has counseled against through the administrative record requirement. *See Citizens to Preserve Overton Park*, 401 U.S. at 419 (discussing the invalidity of affidavits prepared for litigation). To now ignore the analysis in the months subsequent to the formal EA/FONSI would not only require us to elevate form over substance, but it would also require us to ignore the fundamental purpose of NEPA, to ensure that agencies consider the environmental consequences of their actions before they act, which was satisfied in this case. *See Marsh*, 490 U.S. at 371.

Beyond the relevant administrative record, our position might be criticized for looking past the date on which the defendants officially stamped the EA/FONSI because these documents are intended to be the culmination of an agency's environmental assessment. *Cf. Southwest Williamson County Cmty. Ass'n v. Slater*, 976 F. Supp. 1119, 1123 (M.D. Tenn. 1997) (finding that the issuance of an EISis a final agency action), *aff'd in part and vacated in part*, 173 F.3d 1033 (6th Cir. 1999). NEPA and its regulations require agencies to take a "hard look" at the "significance" of the consequences of their actions before issuing an EA/FONSI, *see* 42 U.S.C. § 4332(2)(C), but also contemplate the reality that, after the formal issuance of an EIS or EA/FONSI, it is often the case that new information comes to light or the project changes. *See Marsh*, 490 U.S. at 370-84 (discussing what is required of an agency under the regulations when a project changes or new information comes to light after the formal issuance of an EIS). Here, we have an analogous situation. A known issue came into sharper focus after the formal environmental documents were issued. The defendants apparently had considered the effect of driving the pilings into and below the groundwater table before the April 2000 EA/FONSI, and had concluded that the pilings would have no effect on the contamination. However, when Mr. Gonyo requested reconsideration of the FONSI, the full import of the issue became clear, and the defendants did a reevaluation, specifically analyzing the effect of the pilings.

In this regard, the Supreme Court has instructed that "NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial

approval." *See Marsh*, 490 U.S. at 374. FHWA regulations implementing NEPA accordingly require that "[a]fter approval of the . . . FONSI . . ., the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document . . . remains valid for the requested Administration action." 23 C.F.R. § 771.129(c). As our analysis above demonstrates, the defendants in this case took a "hard look" at the environmental effects of the Project, specifically, the pilings, in the months following the formal issuance of the EA/FONSI, and determined the previous EA/FONSI remained valid. This action put them in substantial compliance with NEPA.

Not only are agencies required to reevaluate their original documents, but sometimes they are also required to supplement formally the prior environmental documents. NEPA itself does not expressly address post-decision supplements to an EA/FONSI, and neither do the implementing regulations. The regulations do discuss when an EIS must be formally supplemented, and the Supreme Court has elaborated on this requirement. *See Marsh*, 490 U.S. at 370-84; 40 C.F.R. § 1502.9(c); 23 C.F.R. § 771.130. Nevertheless, 23 C.F.R. § 771.129(c), quoted above, necessarily requires that an inadequate FONSI be formally supplemented if it no longer "remains valid." *Id.* In this case, the defendants determined that the impacts of the pilings were insignificant and that the EA/FONSI remained valid; thus, no supplementation was required. *See Marsh*, 490 U.S. at 385 ("[H]aving [taken a 'hard look' at the proffered evidence] and having determined based on careful scientific analysis that the new information was of exaggerated importance, the Corps acted within the dictates of NEPA in concluding that supplementation

was unnecessary."); *Price Rd. Neighborhood Ass'n, Inc. v. United States Dep't of Trans.*, 113 F.3d 1505, 1510 (9th Cir. 1997) (finding supplementation to the EA/FONSI unnecessary when the FHWA and Arizona Department of Transportation reevaluation revealed there were no "discernable" differences in environmental effects from the change in the project); *Vine Street Concerned Citizens, Inc. v. Dole*, 630 F. Supp. 24, 29 (E.D. Pa. 1985) ("The projected increase in the Expressway traffic is not quantitatively or qualitatively significantly different from what was considered in the FEIS"; therefore, no formal supplementation is required.). Furthermore, we agree with the district court that the defendants, in effect, created a de facto supplement to the EA, which was the basis of their "decision" that the FONSI was still valid. *See Lake Region Legal Defense Fund, Inc. v. Slater*, 986 F. Supp. 1169, 1196 (N.D. Iowa 1997) (finding that although a "formal 'supplemental EA' has not been prepared in this case," "the administrative record indicates that the defendants have continued to review the impacts associated with changed conditions in the Highway 71 project"). Finally, we note that to remand with an order that the defendants formally supplement the EA and republish the FONSI at this late date, when NEPA's letter and spirit have been complied with, when the pilings are in the ground, and when the bridge is up, would be futile. *See Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990) (noting that a court need not remand a case if doing so would be futile).

B. Reasonable Alternatives

NEPA requires that agencies "study, develop, and describe appropriate alternatives" to major federal projects. 42 U.S.C. § 4332(2)(C)(iii) & (2)(E). The

inquiry into consideration of reasonable alternatives is "independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact." *River Rd. Alliance, Inc. v. Corps of Eng'rs of United States Army*, 764 F.2d 445, 452 (7th Cir. 1985). This does not mean, however, that courts should ignore the context in which alternatives are considered. When, as here, an agency makes an informed decision that the environmental impact will be small, a view which we are required to accord deference, a "less extensive" search is required. *Id.* ("[T]he smaller the impact, the less extensive a search for alternativescan the agency reasonably be required to conduct."). Some courts frame this sliding-scale approach as a "rule of reason" inquiry, which governs "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them." *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978)). Again, our review is not of the agency's substantive judgment, but of the sufficiency of the agency's consideration of the reasonable alternatives. *See Methow Valley*, 490 U.S. at 350 ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." (citations omitted)).

We have stated that logically and legally, an agency is required to address three questions in considering alternatives. *See Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 668 (7th Cir. 1997). "First, what is the purpose of the proposed project (major federal action)? Second, given that purpose, what are the reasonable alternatives to the project? And third, to what extent should the agency explore each particular reasonable alternative?" *Id.*

The defendants set forth three purposes for the Ackerville Bridge Project. The "primary purpose" is to address safety considerations flowing from the layout of the roads and the close proximity of the railroads. R.38, Ex.1003, A.R. at 00004. Another purpose is to bring the existing facility into compliance with State Trunk Highway standards, which govern the necessary requirements for a road to support truck traffic. *Id.* at 00013. A "secondary purpose" is to provide for future expansion of the roadways due to increasing traffic in the region. *Id.* at 00004.

Given these three purposes, we hold the defendants considered a sufficient number of reasonable alternatives and explored them to the extent necessary for this Project. *See Simmons*, 120 F.3d at 668. In its "Summary of the alternatives considered" in the EA/FONSI, the defendants first considered a "No Action" alternative, under which no action would be taken other than routine maintenance. R.38, Ex.1003, A.R. at 00013. However, they concluded this alternative did not address any of the concerns with the existing roadway facility. The defendants also discussed their "Recommended Alternative," which was eventually implemented. *Id.* Finally, they considered four "Other Alternatives," but found them all lacking for various reasons, including safety concerns and cost-efficiency. *Id.*

The defendants also specifically responded to the alternative Citizens urged, and which Citizens now claims was rejected for pretextual reasons. Citizens' proposal included re-aligning the intersection at STH 164 and STH 175 to a right angle, reducing the steep hills along STH 164/STH 175 to a right angle, adding traffic gates at the railroad crossings, and adding signals at the STH 164/STH 175 intersection. Citizens

alleges that this option was rejected because the defendants' true primary motive for some time has been a "desire to preserve a corridor for a possible future 4-lane roadway." Appellant's Br. at 42 (quoting A.R. at 00004). This purpose is why the defendants opted for building an overpass structure instead of opting for its proposal, which would adequately address the safety concerns. *Id.*

As an initial matter, this view of pretextual motive is not supported in the record. The EA/FONSI states:

> The main purpose and immediate need for the STH 175 to STH 60 project is to correct a safety problem at the STH 164/175 intersection, correct a hazardous at-grade train crossing on STH 164 by building a bridge to cross over the train tracks and reconstruct the existing 2-land roadway to correct a deteriorating pavement situation. A secondary focus of the project is to preserve a corridor for a possible future 4-lane roadway.

R.38, Ex.1003, A.R. at 00004. This prioritization is confirmed in multiple other documents. For example, the defendants performed an "Accident Analysis Report," which analyzes the safety concerns necessitating this Project and provides ample statistical data on the safety issues. R.38, Ex.1004, A.R. at 05409-05415.

Regardless, the defendants specifically analyzed Citizens' proposal and found it lacking with respect to all three purposes of the Project:

> Substantial impacts to the town of Ackerville would occur by re-aligning either roadway.

> Adding gates at the railroad crossings would not address the fact that there are currently long delays due to the amount of train traffic here. This will only worsen in the future since Wisconsin Central Limited has plans to double the train traffic on these lines. The installation of signals does not guarantee safety. The close proximity of the railroad tracks to the intersection may cause traffic to back-up past the tracks while waiting to clear the intersection. This proposal does not address the need for the project in regards to state trunk highway standards. The 11% grade just north of the intersection, inadequate shoulder widths, poor pavement structure, and the inadequate stopping sight distances throughout the project are all substantial features of this highway which are not addressed. Also, the need for future expansion to 4 lanes has not been addressed.

R.38, Ex.1003, A.R. at 00006.

Given that the environmental impacts of this Project were found by the defendants to be insignificant, the defendants satisfied the requirement that they consider reasonable alternatives. We are not entitled to second-guess the defendants' reasoned and informed determination that the public interest, including the public safety, would be better served if the preferred alternative were built.

C. Segmentation

Segmentation, as the name suggests, addresses an agency's decision on where one project ends and another begins. "In order to ensure meaningful evaluation of alternatives and to avoid commitments to

transportation improvements before they are fully evaluated," FHWA regulations require that each action evaluated in an EIS or FONSI:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent signifycance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f)(1)-(3).

"Piecemealing" or "segmentation," which Citizens alleges occurred in this case, "allows an agency to avoid the NEPA requirement that an EIS be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects." *City of West Chicago v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 650 (7th Cir. 1983). The purpose of segmentation review is not for a court to decide whether or not an agency drew the correct lines when putting the boundaries on its projects. Rather, "[s]egmentation analysis functions to weed out projects which are pretextually segmented, *and* for which there is no independent reason to exist. When the segmentation project has *no* independent justification, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." *Save Barton Creek Ass'n v. FHWA*, 950 F.2d

1129, 1139 (5th Cir. 1992) (internal quotations and citations omitted). Thus, we are looking for agency action that ignored, or gave insufficient weight to, the factors set out in the regulations in an attempt to avoid the requirements of NEPA.

Citizens claims the County J/Highway 164 Project was impermissibly segmented from the Ackerville Bridge Project to allow the defendants to avoid performing an EIS on the Ackerville Bridge Project. The County J/Highway 164 Project is 18.1 miles and its northernmost point abuts the Ackerville Bridge Project, which is 1.3 miles. Thus, Citizens asserts, of the 19.4 miles of the highway being worked on, only 1.3 miles will not be the subject of an EIS, and this 1.3 miles includes the contamination plume. Furthermore, Citizens submits that the "logical terminus is Hwy. 60, not an artificial part on a hilltop 1.3 miles south of Hwy. 60." Appellant's Br. at 43.

We agree with the district court that these arguments are not persuasive. In the EA/FONSI, the defendants explicitly considered the three criteria for segmentation set out in 23 C.F.R. § 771.111, and gave a reasoned justification of how their segmentation fit each factor. As to logical termini, the defendants explained that "[s]ince the need to bridge the train tracks is the driving force behind this project," the south termini for the Project was established just beyond the bridge touchdown point. The north termini was established as the STH 60/STH 164 intersection. *See* R.38, Ex.1003, A.R. at 00004. Citizens argues that the Ackerville Bridge Project is really just part of the road-widening plan being implemented by the County J/Highway 164 Project. However, as we noted above, we do not find that the record supports the contention that the defendants have been pretextually more

concerned with road-widening than safety. Indeed, as constructed, the bridge meets the immediate safety concerns at this critical juncture of railroad and vehicular traffic. It would be compatible with the roadway expansion of the County J/Highway 164 Project only after modification.

Furthermore, our review is not to determine whether the defendants made the best choice, but only whether they made a choice that was informed and reasonable. *See Save Barton Creek*, 950 F.2d at 1140.

The second factor, independent utility, is the most important factor in highway cases such as this. *See id.* ("In the context of a highway within a single metropolitan area, as the case at issue—as opposed to projects joining cities— courts have focused more on the factor of 'independent utility.' " (citations omitted)). With respect to this factor, the EA/FONSI pointed out that neither the bridge construction project, with its safety focus, or the County J/Highway 164 Project, with its expansion focus, require the construction of any other projects to be usable.

Finally, as to the third factor, restriction of alternatives, the Ackerville Bridge Project contemplates, rather than restricts, future roadway projects, including the possibility of a four-lane project if found to be needed. *See* R.38, Ex.1003, A.R. at 00004. Indeed, making space for future expansion was a "secondary purpose" for the Project in the first place.

In sum, the defendants analyzed the relevant factors set out in 23 C.F.R. § 771.111(f)(1)-(3), and came to a reasoned conclusion. There is also no real evidence to support pretextual motive. Accordingly, we hold there

was no improper segmentation in this case. *See Save Barton Creek*, 950 F.2d at 1139.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

S/_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP,

Plaintiff,

v. Case No. 02-C-0662

NORMAN MINETA, in his capacity as Secretary United States Department of Transportation; FREDERICK WRIGHT, in his capacity as Executive Director, Federal Highway Administration; THOMAS E. CARLSEN, in his capacity as Acting Secretary, Wisconsin Department of Transportation,

Defendants.

DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, DENYING PLAINTIFF'S CLAIMS ON THE MERITS, GRANTING DEFENDANTS' MOTION REQUESTING THE DENIAL OF THE RELIEF PLAINTIFF SEEKS, AND DISMISSING CASE

The Highway J. Citizens Group filed this action under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et. seq., challenging defendants' Ackerville Bridge/Lovers Lane Project and the County J/Highway 164 Project. Plaintiff argues that a "contaminated plume of arsenic and tricholethylene (TCE) is migrating" southeast from the closed Wisconsin-Polk Landfill toward the Ackerville bridge site and western Ackerville where members of the plaintiff organization live. According to plaintiff, driving bridge support pilings 70 - 80 feet into the ground disturbs the soil, thereby creating a conduit for the vertical migration of contaminated groundwater. In addition, plaintiff contends that it was improper for the defendants to segment the Ackerville Bridge/Lovers Lane Reconstruction project from the Highway 164 roadwidening project. Plaintiff asks the court to find a NEPA violation, and to direct the defendants to prepare an Environmental Impact Study (EIS) for the Ackerville Bridge/Lovers Lane project and a Supplemental EIS for the County J/Highway 164 Project. Furthermore, plaintiff seeks the issuance of a preliminary and permanent injunction requiring defendants to cut the bridge pilings off at ground level, grout along the length of the piles, and return the area to the natural elevation before bridge construction.

STANDARDS OF REVIEW

Injunctions

When considering whether to grant a preliminary injunction, the court must first consider "whether the moving party has demonstrated: 1) a reasonable likelihood of success on the merits, and 2) no adequate remedy at law and irreparable harm if preliminary relief is denied. If the moving party has demonstrated those items to the satisfaction of the court, then it must then look at: 3) the irreparable harm the nonmoving party will suffer if the injunction is granted balanced against the irreparable harm the moving party will suffer if the injunction is denied, and 4) the public interest, i.e., the effect that granting or denying the injunction will have on non-parties." *Aircraft Owners & Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1424-25 (7th Cir. 1996) (internal citations and quotation marks omitted). The Seventh Circuit Court of Appeals has adopted a sliding scale approach where the greater the movant's chances of success on the merits, the less the movant must show that the balance of hardships tips in the movant's favor. *Ty, Inc.* v. *Jones Group,* 237 F.3d 891, 895 (7th Cir. 2001).

If the court finds a procedural violation with respect to the Ackerville Bridge/Lovers Lane Project, it is not imperative that an injunction issue. In NEPA cases, traditional equity standards govern whether or not to grant injunctive relief. *See State of Wis. Weinberger, 745* F.2d 41 2, 426 (7th Cir. 1984). Relief must be tailored to fit the particulars of the case, and the environmental concerns of NEPA must be balanced against the larger interests of society that might be affected adversely by an overly broad injunction. The court must "consider the degree to which the NEPA

interest would, in fact, be served by an injunction, [as well as] the efficacy of other forms of relief . . .." *Id.*

Further, a preliminary injunction is not necessarily appropriate on review of an administrative record, where the ultimate relief sought is a permanent injunction and the record is complete. *Cronin* v. U.S. *Dept. of Agriculture,* 919 F.2d 439, 444-445 (7th Cir. 1990)("[I]f the two stages are collapsed into one because there will never be a fuller hearing · then considerations of irreparable harms are out the window and the only question is whether the plaintiff is entitled to an injunction, period.") Because the briefing on the merits is complete, the court will deny the request for a preliminary injunction and consolidate the court's decision on the permanent injunction into its decision on the merits.

NEPA

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(c) .[1] It "was enacted to regulate government activity that significantly impacts the environment and 'to help public officials make decisions that are based on an understanding of environmental consequences, and

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[1] The Council on Environmental Quality (CEQ) administers NEPA and has promulgated regulations for that purpose. 42 U.S.C. §§ 4342, 4344(3). These regulations are binding on federal agencies, see *Heartwood, Inc.,* 230 F.3d at 949, and are entitled to "substantial deference" by the courts, *Marsh v. Or. Natural Resources Council,* 490 U.S. 360, 372 (1989). Individual agencies have promulgated their own regulations to supplement the CEQ regulations. *See* 40 C.F.R. § 1507.3. The Federal Highway Administration's (FHWA) regulations implementing NEPA are applicable here, *see* 23 C.F.R. § 771.101; and the court will cite to both the CEQ's and FHWA's regulations.

take actions that protect, restore, and enhance the environment.'" *Heartwood, Inc. v. United States Forest Serv.,* 230 F.3d 947, 949 (7th Cir. 2000) (internal citations and quotation marks omitted). To those ends, NEPA establishes procedures that federal agencies must follow when undertaking significant projects. *See* 42 U.S.C. § 4332(2)(C). Under NEPA, agencies proposing "major' Federal actions significantly affecting the quality of the human environment" must prepare a detailed EIS discussing the proposed action and its environmental effects. *See* 42 U.S.C. § 4332(2)(C).

In order to determine whether the proposed action will significantly affect the quality of the human environment, and thus whether and EIS is necessary, the agency must prepare an Environmental Assessment (EA). *See* 40 C.F.R. § 1501.4(2) (b); 23 C.F.R. § 771.119. An EA is a brief, public document describing the proposed project and identifying its potential social, economic, or environmental impacts, alternatives and other environmental reviews which the agency should perform concurrently. 23 C.F.R. § 771.119(b), (d); *see also River Rd. Alliance, Inc. v, Corps of Eng'rs of United States Army,* 764 F.2d 445, 449 (7th Cir. 1985) ("The purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement."). It has been described as a "rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement - which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project - is necessary." *Cronin,* 91 9 F.2d at 443. If the agency finds that the action will have no major or significant

impact, the agency prepares a Finding of No Significant Impact (FONSI). 40 C.F.R. § 1508.13; 23 C.F.R. § 771.121(a). The Federal Highway Administration (FHWA), the federal agency in this case, has delegated the initial duty to perform many of these tasks to its funding applicants, here the Wisconsin Department of Transportation (WDOT). *See* 23 C.F.R. § 771.119.

APA

Review of this action is governed by the Administrative Procedures Act(APA), under which courts must set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 802, 98 S. Ct. 2096, 56 L. Ed.2d 697 (1978). To determine whether an agency action is arbitrary or capricious, the court considers "whether the decision was based on a consideration of the relevant factors and whether there has been clear error of judgment." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378, 109 S. Ct. 1851, 104. L. Ed. 2d 377 (1989) (citations omitted). The court must be satisfied that the agency "examine[d] the relevant data and articulate[dl a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass 'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). If an agency considers the proper factors and makes a factual determination whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference. *Marsh,* at 377, 109 S. Ct. at 1861; see also *Greenpeace Action v. Franklin,* 14 F.3d 1324, 1330 (9th

Cir. 1992). Pursuant to this deferential standard, reviewing courts should not substitute their judgments for those of an agency as to the environmental consequences of its actions. *Kleppe v. Sierra Club,* 427 U.S. 390, 410, n. 21, 96 *S.* Ct. 2718, 49 L. Ed. 2d 576 (1976). Consequently, the standard of review when examining an agency's decision under NEPA is narrow. *See* Marsh, 490 U.S. at 378, 109 S. Ct. at 1861.

FINDINGS OF FACT

Plaintiff commenced this action pursuant to the APA, NEPA, CEO, and the Wisconsin Environmental Policy Act (WEPA), § 1.11 Wis Stat. and Wis. Adm. Code Ch. TRAN 400 *et seq.* The complaint, filed July 3, 2002, asks the court to: (1) enjoin the defendants from proceeding with the Ackerville Bridge/Lovers Lane Reconstruction project 2748-01-00, until they have determined the location and extent of the contaminant plume; (2) to mandatorily direct the defendants to pump grout where any piles have presently been driven to seal the areas of distributed soil around the piles; (3) to require the defendants to perform an EIS for the Ackerville Bridge/Lovers Lane Reconstruction portion of the project; (4) to require defendants to prepare a supplemental EIS for all of the County J/Highway 164 project, including that portion consisting of the Ackerville Bridge/Lovers Lane Reconstruction project; (5) to enjoin the defendants from widening County J/Highway 164 from 1-94 in Waukesha County to STH 60 in Washington County from two lanes to four lanes; and (6) to enjoin defendants from realigning Lovers Lane and from changing the present alignment, except to improve the pavement and add shoulders without moving the road.

A. Project 2748-0 1-00

There are two projects at issue in this litigation, and both are considered major federal actions. The first is identified Project 1.0. 2748-01-00. An (EA) for Project 2748-01-00 was signed between October 29, 1999, and December 12, 1999. (Ex. 1003; R. 0011-00075) The project is summarized as follows:

1. Description of the Proposed Action.

The Wisconsin Department of Transportation has acquired jurisdiction of Lovers Lane Road as part of a jurisdictional transfer involving County Highway J in Washington and aukesha Counties. Currently, Lovers Lane Road does not meet standards for a State Trunk Highway.

The proposed action includes reconstruction of Lovers Lane Road from a point 0.8 km (0.5 mi) south of State Highway 175 to State Highway 60 (see project location map – exhibit 1 and project layout - exhibit 2). The southern .97 km (0.60 mi) is proposed to be constructed with a rural section (shoulder and ditches) on the existing alignment. The northern 1.2 km (0.74 mi) would be constructed with an urban section (curb and gutter) offset from the existing alignment 8.22 m (27 ft) to the east. Right of Way would be acquired for future expansion to a four lane roadway with future lanes being added to the west side of the proposed two lanes when warranted. The impacts associated with the ultimate 4-lane roadway have been analyzed in this Environmental Assessment.

A new road (Foxboro Lane Extension) is proposed to be builtin the northwest quadrant of

STH 164 and STH 175 to connect the two roadways. Sherman Road and Fond du Lac Drive would also be connected along the southern railroads right-of-way.

An overpass structure is proposed to be built at the Wisconsin Central Limited and the Wisconsin Central Limited and the Wisconsin Southern Railroads in order to remove the exiting at-grade crossings. The Sherman Road/Fond du lac Drive connection would also be located under this structure. An additional overpass structure would be provided at State Highway 175. (Ex. 1003; Ad. Rec. 0001 2)

The purpose and need for the project are described in the EA as follows:

The Wisconsin Department has acquired jurisdiction of Lovers Lane Road as part of a larger jurisdictional transfer process involving County Highway J in Washington and Waukesha Counties. The existing facility does not meet standards for a State Trunk Highway including sight distance, pavement and shoulder widths, and clear zone requirements. The pavement structure from STH 175 to STH 60 is inadequate to support truck traffic, thus trucking is restricted from this segment of roadway. The roadway surface north of STH 175 is in good condition due to maintenance resurfacing placed in 1992. However, prior to resurfacing, the existing roadway had experienced severe frost damage and alligator cracking throughout the project length. The roadway was advisory signed as a rough road, and residents and county maintenance officials

reported the presence of tree stumps in the roadway fill and subgrade. The existing shoulder width north of STH 175 varies from two (0.6 m) to four feet (1.2 m), which is less than the standard 10-foot (3-meter) minimum for a rural State Trunk Highway. The intersection of Lovers Lane and State Highway 175 is a high accident location with accident rates exceeding the statewide accident rate. In 1998, there were 11 accidents at the intersection of STH 1 64/STH 1 75. The 1998 accident rate was over three times the statewide average for rural State Trunk Highways. Also associated with this intersection is the close proximity of the railroads which may cause traffic to backup to the railroads while waiting to move through the intersection.

In rural areas separation of grade structures (at railroad crossings) should be considered when the highway design speed exceeds 50 mph (80 km/h) and the exposure factor exceeds 75,000. The exposure factor for this project is 223, 500.

The Regional Transportation System Plan for Southeastern Wisconsin: 2020, endorsed by the Southern Regional Planning Commission, recommends Arterial highway capacity improvements and expansion on this highway from Interstate 94 in Waukesha County to State Highway 60 in Washington County. This plan is based upon a year 2020 regional land use plan which contains implications for the preservation and the enhancement of the environment within the region, including the containment of urban sprawl, the preservation of environmental

> corridors, and the preservation of prime agricultural lands.

(Ex. 1003; R. 0001 3)

The EA was available for public comment from February 22, 2000, to April 7, 2000. Included is "Basic Sheet A," containing a summary of a March 23, 2000, public hearing conducted in connection with the project. (Ex. 1003; R. 0004) It notes that defendants considered whether a former ". . . Waste Management Landfill site is a significant impact and therefore warrants preparation of an EIS," and contains the following response:

> The [Wisconsin] Department of [Transportation] has determined that potentially hazardous materials associated with an identified landfill site, located 396 m (1300 ft) west of STH 164 on the south side of STH 175, will not affect the Department's proposed project. This determination is based on extensive coordination with the Wisconsin Department of Natural Resources (WDNR), documentation review, and field analysis.
>
> There is ground water contamination in the area surrounding the landfill with trichloroethene (TCE) being one of the contaminants. This site has been under remediation for several years. The closest monitoring well is located approximately 122 m (400 ft) west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l, well below the WDNR groundwater enforcement standard of 6 ug/l. Indicated ground water depths of 9m (30 ft) are well

> below the excavation limits of the roadway or bridge construction.
>
> The Department has determined that the potential for encountering and impacting hazardous materials during construction of this project does not exist. Therefore, there is no purpose or need for preparation of an EIS.

(Ex. 1003; R. 00005)

The EA includes a summary of public meetings regarding the project that took place prior to the March 23, 2000, meeting. (Ex. 1004; R. 00017) The EA, including the section prepared after the EA was released for public comment, includes reviews of alternatives that were considered, including a "no-action alternative," and why those alternatives were not adopted. (Ex. 1003; R. 00006 and 000013) An Accident Analysis Report, relating to the stated primary purpose of the project, was completed for the project also. (Ex. 1004; R. 05409-05415)

On or before February 21, 2000, Jeffrey Gonyo, a member of the plaintiff, raised concerns about the potential impact that the former waste management site and the project could have on the environment. (Ex. 1005; R. 00143-00144) Plaintiff prepared documents, dated February 21, 2000, entitled, "The Bridge To Nowhere Fact Sheet (Ackerville, WI)." (Ex. 1006; R. 00116 -00117)

By one of those documents, plaintiff stated that the southeasterly flowing ground water may be contaminated with toxic, cancer-causing chemicals, and at least two private wells in the Ackerville-Highway 164 vicinity have tested positive for dangerous levels of

trichloroethylene (TCE), which probably originated from the landfill. According to plaintiff, "[f]urther disturbance of the soil and underground water flows in the Ackerville area will lead to more incidents of cancer and other life-threatening diseases. Therefore, allowing the WDOT to build this massive bridge would be like 'throwing gasoline on an already burning fire!'" (Ex. 1006; R. 00117)

Initially defendants responded to those concerns by posing and answering the following question in a document entitled, "Fact Sheet/Topics of Interest:"

Environmental Considerations

- The Waste Management Landfill - Hazardous Materials. If there is contamination in the shallow groundwater, couldn't the structure pilings create a "channel" to contaminate to the deep groundwater where our drinking water comes from?:

- *Acknowledge that both WDNR and WDOT are aware of the concerns relating to the Polk Landfill. You can thank Mr. Gonyo for helping to bring the issue to the forefront.*

- *WDOT will be addressing the contaminant concerns relating to the STH 164 project as part of the Phase 1 hazardous materials assessment. The assessment will evaluate DNR documents about the landfill and assess what impact may be associated with the high way project activities. The WDOT will coordinate with the WDNR as needed. The report will include ~~any~~ recommendation that may be needed to address hazmat concerns.*

- *The Phase 1 Assessment Report will become a public document available for review.*

- *Though preliminary assessment of available information has lead both DNR and WDOT to think there are not likely to be significant project hazmat concerns relating to the Polk Landfill it would be premature to make definite statements until the Phase 1 report is completed.*

(Ex. 1007; R. 00143-00145) (bold and italics in original)

A draft version of the above-noted **Fact Sheet/Topics of Concern**, included the following information relating to the pilings for the project and the former waste site nearby:

Environmental Considerations

- The Waste Management Landfill-Hazardous Materials. If there is contamination in the shallow groundwater, couldn't the structure pilings create a "channel" to contaminate to the deep groundwater where our drinking water comes from?

  This landfill was closed in the 1980's. Since that time, extensive monitoring and remediation has taken place. There has been some concern regarding ground water contamination spreading in the direction of Lovers Lane Road. However, the project requires limited excavation in this area (footing for substructure units of the bridge) and encounters with ground water is unlikely .

(Ex. 1008; R. 000146-000147) (bold and italics in original)

By letter dated March 14, 2000, Ken Wade, in his capacity as a Hazardous Materials Engineer for the Environmental Team Transportation District of WDOT, noted that the latest landfill data collected by Waste Management "confirms that the concentration of trichloroethene (TCE) nearest to the project area" was decreasing or stable. He observed that it was "unlikely that project pilings or water detention/infiltration basis will cause an impact on plume movement or concentrations." (Ex. 1009; R. 00728)

During the March 23, 2000, public hearing regarding the project, a member of the plaintiff challenged the proposition that the project would have no significant environmental impact. He relied on the assertion that the above-noted Polk Landfill was considered a "toxic-waste dump site." The opponent made statements concerning the flow of the contaminant plume and the serious and adverse effects of the contaminants on human health and raised concerns about the pilings for the project. (Ex. 1010, 1011; R. 00189-00195; 00491) In addition, Gonyo testified at the March 23, 2000, public hearing. His testimony, which he supplemented with many exhibits, addressed a contaminant plume from the former waste site and health risks. (Ex. 1012; R. 00197- 00254; 00304-00454)

Prior to the March 23, 2000, public hearing officials involved in the project exchanged e-mails regarding their response to the "hazmat" issue. Some suggestions from Brian Bliesner included: "1) say nothing, (2) final results aren't in, we'll be doing more

testing, (3)excavation is only 5 feet deep, we see no problem given the monitoring wells results, (4) all data including DNR's suggestion says there is no problem. But we can't ignore the possibility it might be there. We will monitor during construction and will have a plan to deal with it that includes removal and appropriate disposal if we do encounter haz mat." Kenneth Wade responded, in part, with the following statement:

> Though preliminary assessment of available information has lead both DNR and WDOT to think there are not likely to be significant project hazmat concerns related to the Polk Landfill, it would be premature to make definitive statements until the Phase 1 report is complete.
>
> ...

(Ex. 1013; R. 00838)

The EMCS Design Group worked with the Wisconsin Department of Natural Resources (DNR) in connection with a review that included consideration of the impact of the former waste site on groundwater. (Ex. 1001 & 1002; R. 02815-02817, 02974) They reviewed a March 30, 1990, report titled "Two-Year Ground Water Monitoring Report Polk Sanitary Landfill Washington County, Wisconsin." (Ex. 1000; R.02774- 02814) This report was prepared at the request of the landfill's owner, Waste Management of Wisconsin, Inc., and includes a section entitled "Ground Water Assessment." (Ex. 1000; R.02778, 02780, 02784) The report discusses various aspects of groundwater around the former waste facility, including, the flow of groundwater both vertically and horizontally, the location of monitoring wells, a map of

arsenic concentration, and a conclusion that TCE was not in the landfill. (Ex. 1000; Ad. Rec. 02774, 02778, 02781, 02811) On February 23, 1994, EMCS, issued a "Hazardous Materials Initial Site Review Report" for the project. (Ex. 1014; Ad. Rec. 00873-00908) And, on April 7, 2000, EMCS issued another document entitled, "Hazardous Materials Site Investigation Report Phase I Addendum." (Ex. 1015; Ad. Rec. 00709-00714)

The Phase 1 Addendum was completed "[b]ased on the changes to the scope of the project . . ., as well as the time elapsed since the original reports were created, it was determined that an addendum to the 1994 Phase I investigation is warranted." *Id.* With information relating to the site of the project, the addendum contains the following statement regarding the former waste facility near the project and bridge pilings for the project:

> Site 7 (previous): Town of Polk/Waste Management (WDNR FID # 267062400) was identified in the original phase I report as an inactive waste disposal site. There is groundwater contamination in this area with Trichloroethene (TCE) being one of the contaminants, The closest monitoring well is located approximately 400 feet west of STH 164. TCE concentrations in this well have dropped from 3 to 2.2 ug/l , well below the WDNR groundwater enforcement standard of 5 ug/l. This site is 700 feet west of where the proposed Foxboro extension connects to STH 175 and indicated groundwater depths of 30 feet are well below the excavation limits of the roadway. Therefore it is very unlikely that contaminated groundwater will impact this project. It is also unlikely that pilings for the structure supports

> or retention basins will cause an impact on plume movements or concentrations.

Id.

On April 25, 2000, the last signature was placed on a FONSI issued for the project. (Ex. 1003; Ad. Rec. 000001-0002) The FONSI was premised on the earlier EA for the project. *Id.*

In June of 2000, Gonyo, in his capacity as a member of the Town of Polk Central Committee for Highway J Citizens Group, U.A., 26668 Hwy 164, Slinger, Wisconsin 53086, (which group appears to be a precursor of the plaintiff) made a request to the United States Department of Transportation, FHWA, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 for information relating to the project. Gonyo was provided with that information under cover of a letter dated July 12, 2000. (Ex. 1016)

Gonyo, again in his capacity as a member of the Town of Polk Central Committee for the Highway J Citizens Group, U.A., requested the Federal Highway Administration to reconsider the FONSI for the project by letter dated July 7, 2000, and recommended an Environmental Impact Statement (EIS) for the project. (Ex. 1017) Gonyo raised various grounds for his requests including an assertion that the pilings for the project should not be inserted into the ground until two landfill sites were "completely cleaned up . . .." (*Id.)* The FHWA responded to Gonyo on August 24, 2000. (Ex. 1022; R. 06225-06226)

On August 19, 2000, Gonyo, again in his capacity as a member of the "Town of Polk Central Committee for the Highway J Citizens Group, U.A.,"

advised the FHWA that one of the documents that the agency provided to him pursuant to his request under the FOIA was incomplete. (Ex. 1018) Under cover of a letter dated August 22, 2000, the FHWA provided Gonyo with the documents he requested. (Ex. 1019)

WDNR officials provided WDOT with a memorandum dated August 22, 2000, stating conclusions about why the project, including the portion of the project that called for the insertion of the pilings into the ground to support overpass structures, would have no substantial impact on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to groundwater contamination in the vicinity. (Ex. 1020; R. 12294-12297) That memorandum included the following findings: TCE seems to originate from a point approximately 1500 feet west/northwest of the intersection of Hwy 164 and Sherman Road, the Polk Sanitary Landfill is located approximately 1600 feet northwest of the proposed road construction project, and the groundwater flow has been determined to be southeasterly from the apparent source toward the proposed road project. *Id.*

The memorandum noted that the WDNR disagreed with the allegation that leachate contaminated the underlying groundwater. In that regard, the WDNR found as follows: "WMWI - Polk Landfill is not considered a likely source of the TCE (trichorethylene) plume because TCE has not been detected in either the landfill leachate
or consistently in monitoring wells directly adjacent to the landfill." *Id.* The memorandum further asserted that "[t]he concentration of TCE in area wells has ranged from 17 ug/l (micrograms per liter) in 65-foot deep private wells (1985) to 6 ug/l in a 95- foot deep

private well (1987). Monitoring wells screened at depths of 50-60 feet show stabilized concentrations of TCE consistently below 10 ug/l. These concentrations exceed the WI Administrative Code Chapter NR 140 Enforcement Standard of 5 ug/l." *Id.* The memorandum stated that the conclusion was based upon private drinking water and well sampling, well construction logs, and the DNR's understanding of the project. *Id.*

The WDNR's memorandum set forth specific findings regarding the pilings for the project as follows:

> Driving pilings to depths greater than 30 feet could potentially encounter contaminated groundwater. However, such vertical steel pilings would not, in themselves, contribute any additional contaminants to the groundwater, nor significantly alter flow along any horizontal plane. Theoretically, the flow of groundwater could be altered along vertical lines due to penetration of a piling thru lenses or layers of dense, clay rich soil known as "confining layer" or aquatards. Such layers, if present, normally act to prevent downward or upward movement of groundwater. A piling might compromise a confining layer by creating a narrow (0.5" - 3" maximum) concentric space along the outside of a piling or casing.
>
> However, we believe the placement of pilings will not significantly affect groundwater conditions on this project. As documented by well logs and soil bearings, there is no effective, continuous confining layer in the project area. Without any effective separation of the shallow sand and the gravel aquifer from the deeper dolomite aquifer, groundwater already moves

> freely along vertical planes. In fact, several well nests near the proposed project record consistent upward gradients, an indication that deeper aquifer water is discharging into the shallower system. The relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even several dozen pilings is insignificant compared to the quantity of natural vertical movement.

Id.

The identities and qualifications of the WDNR employees who wrote the memorandum are cited at pages 20 to 22 of the "Defendants' Answers to the Court's Questions." Those individuals are Philip N. Fauble, a Senior Hydrogeologist, Southeast Region Waste Management Program, and Charles A. Czarkowski, Southeast Region Drinking Water & Groundwater Program Expert. (Ex. 1021, pp. 20-21) Fauble has worked with the WDNR for 12 years, and his duties include inspections of existing and closed landfills for compliance with state groundwater standards, and evaluating responses to groundwater contamination from landfill releases. He holds a Bachelor's degree in Geologic Science, and is a Wisconsin Registered Professional geologist. Czarkowski has worked with the WDNR for 23 years, and is a Wisconsin Certified Soil Tester and Morphological Evaluator. He has participated in original and subsequent WDNR investigations of drinking water problems in Ackerv'ille since 1984.

At plaintiff's request, the United States Environmental Protection Agency (EPA) made inquiries about the project. In a letter dated August 28, 2000, the WDNR responded to an EPA inquiry by

advising that TCE was not coming from the former waste facility near the project. The letter noted the "WDNR has also determined that the proposed WDOT road expansion and bridge project on STH 164 will not have an adverse impact on groundwater in the Ackerville area." (Ex. 1023, 1024; R.10166-10171, 10164, 10165) The EPA responded to plaintiff's concerns in a letter dated January 12, 2001. (Ex. 1024; R. 101 64-10165)

On January 22, 2001, John E. Thresher, Jr., apparently acting on behalf of the plaintiff's former attorney, provided Fauble with criticisms of the DNR's groundwater analysis at the former waste site near the project. (Ex. 1025, R. 12298- 12317)

On February 26, 2001, EMCS issued a report entitled, "Subsurface Exploration and Geotechnical Engineering Analysis," acknowledging that the pilings for the project would extend below the groundwater level. (Ex. 1026, pp. 8-9; R. 03219- 03235) The WDOT petitioned the Wisconsin Commissioner of Railroads (OCR) on May 16, 2001, for alteration and closure of railroad tracks at the public crossing in the immediate vicinity of the project. (Ex. 1027; R. 14100) On July 10 and 11, 2001, a public hearing took place in connection with that petition. Plaintiff, acting under the name "Stop Unnecessary Road Expansion (SURE)," presented testimony and a report from Thresher. (Ex. 1027 p. 11; R. 14110). Its evidence included a letter dated, July 11, 2001. (Ex. 1028; Ad. Rec. 14559-14563)

By e-mail message dated July 26, 2001, Art Bauman, of WDOT, referenced a June 2001 publication of a study about the environmental impact of pilings placed into contaminated soil:

> Attached is a copy of the study that was referenced in the June issue of Civil Engineering that discussed the impact piling driven into contaminated soil would have on the local groundwater. We are using Cast-in-place concrete piling which the study concludes would not cause the transport of contaminated materials between aquifers as contended by SURE'S expert John Thresher.
>
> A reminder that the DNR has indicated that the area is one distinct aquifer and not several separated aquifer's as Mr. Thresher has testified. Also, the DNR indicates that the presence of an upgrade flow of groundwater meaning it flows from deep to shallow which would prevent the contamination from flowing down to the wells.

(Ex. 1029; R. 13828)

The study to which Bauman referred was entitled, "Deep Foundations on Brownfield Sites." (Ex. 1030; R. 13829-13834) The study states, in part:

> Abstract
>
> Most older industrial areas exhibit some soil and/or groundwater contamination, ranging from minimal to DNAPL'S. Redevelopment of such "brownfields" areas often involves deep foundations such as piling. Regulators fear that deep foundations might transmit contaminants from polluted upper layers to clean lower aquifers. This potential problem has three parts: direct transfer of contaminated soil by the tips, formation of preferential pathway by the pile,

and flow through the pile material. The direct transfer part is shown to be minimal, especially with pointed pile tips. The pathway part was investigated using model studies, in which flow was induced through clay soil columns with segmented bases to separate central and perimeter flow. Models with and without various types of model piles fully penetrating the clay were permeated with water and brine. Both flow and contaminant measurements indicated no increase in transmission rates for displacement-type piles of low-permeability materials, i.e., treated wood and steel pipe. Two piles induced higher transmission: untreated wood by internal flow and steel 'H' piles by pathway formation (due to low lateral pressures). It was concluded that piles of the proper types driven through a contaminated zone did not create a significant pollution potential.

Introduction

Brownfields are often desirable building sites because of their location within or close proximity to urban areas. Construction at these sites often raises questions regarding environmental and health issues. One such question is the potential for contaminating deeper aquifers via the pile foundations often required for industrial or multi-story structures. Piles penetrating contaminated soils and driven through an aquifer to achieve end-bearing in a deeper sand aquifer may transfer or provide a migration pathway for contaminants. The current knowledge of pile/soil behavior in a contaminated soil environment is very limited. Consequently, regulatory authorities often

require extensive and expensive protection measures (such as grouted casing) for piles in this situation. Thus, there is a real worlds need to address this topic to serve as a guide in the design of pile foundations in a brownfield environment.

Problem Statement and Objectives

The main concern is that the penetration of the contaminated zone and the aquitard by the pile will transfer and/or allow the migration of contaminants vertically. While there would be slow movement through the clay aquitard, the mechanisms created by the pile are (1) direct transfer of soils at the pile tip, which is a one-time event, (2) flow in the zone disturbed by pile-driving, including the pile/soil interface, and (3) flow through the pile materials itself. The flow mechanisms are long-term phenomena. The objective of this study was to evaluate the cited mechanisms to determine if pile foundations can be used in an environmentally safe manner for a brownfield situation without special protective measures. Direct transfer was evaluated through geohydrologic calculations. The vertical transfer of flow along the pile/soil interface and the influence of the pile type was investigated through laboratory modeling. The long-term flow is the most serious potential problem. The model tests investigated the effects of pile type on flow and contaminated migration.

...

Conclusions

> The results of this study confirmed the findings of the earlier work by Hayman et al (1) but expanded them. Driven piles can be used on even "brownfields" sites without causing adverse environmental effects. However, the proper type(s) of piles must be selected to avoid such effects. The piles should be of low-permeability materials such as steel and possibly concrete to avoid internal flow. A displacement-type pile such as wood, pipe, or "square" piles should be used to develop the lateral pressure needed to seal any annular space. Use of a pointed pile tip reduces direct transfer of contaminants to a negligible level.

Id.

By e-mail dated August 24, 2001, Czarkowski of the WDNR, who was one of the authors of the above-noted August 22,2000, memorandum, (¶ ¶ 34-41) made the following inquiry to Art Bauman, of WDOT:

> I am the Drinking Water/Groundwater program coordinator here in the southeast region. I and others in our department have appeared at various public meetings to address concerns of opponents of the Ackerville Bridge project. This group and their attorneys/consultant claim there are environmental hazards related to contaminated groundwater which the bridge will make worse. Most recently, their consultant specifically stated that the driving of pilings would provide a path for the groundwater to migrate.

> When I first reviewed the environmental concerns regarding this project as part of the team here at DNR, I was aware that pilings would be driven below depths of 30 feet, which is where the groundwater occurs. We do not dispute that a very low level of trichlorethylene may exist in this groundwater. I offered an opinion that these pilings would not in any way affect groundwater flow, assuming they would be filled with solid material.
>
> **The reason I am writing now is to confirm that such pilings will indeed be filled with some impermeable material such as concrete or bentonite clay, and not merely be hollow casing.** I have reviewed the plan sheets and see that the specification reads *"support pier on 10 3/4" dia. cast-in-place concrete piling (min T = 1/4")* estimated 50 f. long and driven to a minimum brg. value of 45 tons per pile."
>
> Does this mean the pilings will be filled with concrete?
>
> If yes, then I can maintain my opinion that these should not provide a significant pathway for migration of groundwater. I[f] not, then I would like to discuss the possibility of a design change that would fill these pilings with bentonite or cement.

(Ex. 1031; R. 13827) (bold in original).

Bauman responded to Czarkowski by e-mail dated August 27, 2001, stating:

> I have confirmed your question with Keith Nelson, the structural engineer for these bridges. All pilings driven for the bridges over the railroad tracks and STH 175 will be filled with concrete. The MSE Wall between these structures will not have any piling driven for it.
>
> We are using H-piling for a retaining wall that is to be located on the east side of Lovers Lane starting approximately 600 feet north of the north end of the structure over STH 175 (at the top of the hill). The bottom elevation of the retaining wall (elevation at the final ground surface) is approximately forty feet higher than the elevation of STH 175 at the STH 164 overpass structure. The piling will be driven to a depth of no more than 16 feet. If this is a concern please let me know ASAP.

(*Id.*) (bold in original)

Meanwhile, the OCR issued its Final Decision on October 19, 2001, granting the petition of WDOT to alter and close the railroad tracks in the vicinity of the project. (Ex. 1027; R. 14099, 14100) The Final Decision includes a summary of environmental issues that were raised in connection with the petition, including the allegations that the plaintiff makes regarding the pilings for the overpass structures for the project. That portion of the order contains the following comments regarding the pilings and the WDNR's review:

> At the hearing, the DOT submitted a "Finding of No Significant Impact" (FONSI) issued by the Federal Highway Administration. [footnote excluded] The FONSI was prepared for the STH

164 project, including the highway bridge over the railroad tracks. The FONSI states:

> This finding of no significant impact is based on the attached environmental document which has been independently evaluated and determined to adequately and accurately discuss the environmental issues and impacts of the proposed project. It provides sufficient evidence and analysis for determining that an environmental impact statement is not required. This project will not have any significant impact on the human environment.

This finding was based on an environmental assessment (EA) prepared by the DOT in accordance with its own administrative rules and with federal law. DOT preformed an initial assessment in 1999 that indicated no significant impacts from the STH 164 project. [footnote omitted] The DOT then took public comments on the EA, including a public hearing, and reviewed the EA in coordination with other agencies [including, FHWA, Wisconsin Department of Natural Resources (DNR), US Fish and Wildlife Service, State Historical Society, Department of Agriculture, Trade and Consumer Protection, Natural Resources Conservation Service and several Indian tribes]. The FONSI document was approved by FHWA on April 25, 2000.

A citizen group opposing the bridge project, Stop Unnecessary Road Expansion (SURE), presented testimony at the hearing disputing this finding. SURE retained an expert witness,

John Thresher, who testified at the hearing and submitted his own written analysis. It is undisputed that portions of groundwater west of the project area are contaminated with arsenic and tricholoroethylene (TCE). The question is whether the bridge project will worsen or affect this contamination. Although SURE raised other environmental concerns, the primary concern expressed by SURE relates to the potential spread of contaminated water in the project area. More specifically, SURE contends that the pilings needed for the bridge will penetrate the water table and potentially allow the migration of contaminated water toward private wells in the Ackerville area.

In essence, SURE argues that the environmental assessment prepared by the DOT and approved by the FWHA is inadequate and asks that the OCR order a full environmental impact statement (EIS) or, alternatively, to deny approval of the bridge construction until DOT prepares a full EIS. [footnote omitted]

...

A review of the evidence submitted at the hearing supports the reasonableness of adopting the DOTS environmental assessment. The primary concern is that driving the bridge pilings may create a way for contaminated groundwater to spread further. The water table is 30' below the surface. The pilings will extend 50' to 73' below the surface. SURE'S expert states: "driving pilings through such sediments may disrupt the contaminant distribution thereby potentially contaminating additional

private wells well within Ackerville." (Exhibit 33)

The DNR advised DOT regarding potential adverse effects on contaminated groundwater. The DNR stated: 'our conclusion is that the road project will not have any substantial affect on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to groundwater contamination in the vicinity.' (Exhibit 30 – DNR memorandum to DOT dated August 22, 2000) The DNR specifically considered the effect of the pilings and determined that driving would not "significantly affect groundwater conditions on this project." DNR further stated that driving pilings through "layers of dense clay-rich soil known as 'confining layers' or aquatards could theoretically alter the flow of groundwater "along vertical lines." However, DNR concluded that there is no confining layer at the bridge site and therefore "groundwater already moves freely along vertical planes." Consequently, driving pilings will not significantly affect the movement of groundwater.

The environmental issues raised by the opponents have already been adequately addressed by the environmental assessment done by DOT. Requiring another EA or a full EIS would only serve to delay an important safety project without any likely environmental benefit.

(Ex. 1027, pp. 11-13; R. 14110-14112) On November 29, 2001, OCR denied petitions for a rehearing. (Ex. 1032; R. 14079)

In a letter dated December 12, 2001, Gonyo, in his capacity as a member of the "Town of Polk Central Committee for the Highway J Citizens Group, U.A.," made another FOIA request to the FHWA for all documents that came into the agency's possession following the June 19, 2001, FOIA request. Gonyo received a response, dated December 18, 2001. (Ex. 1033) Thresher, discussed the pilings in a February 2, 2002, document entitled, "Summary of the Groundwater Contamination in the Ackerville Area Washigton County, Wisconsin." (Ex. 1034; R. 10128)

The Wisconsin Department of Health and Family Services, Division of Public Health, issued a February 26, 2002, document entitled, "Public Health Assessment for Ackerville Area Groundwater" for the WDNR, the Washington County Health Department, and the Agency for Toxic Substances and Disease Registry. (Ex. 1035; R. 10142-10157) The assessment concludes:

> There is limited groundwater contamination in the Ackerville area west of the intersection of Highways 164 and 175.
>
> Although one private well has tested positive for a trace level of TCE, none of the private wells in this area contain contamination at levels of health concern.
>
> Concerns about taste and odors in private well water are the result of aesthetic problems from naturally occurring iron levels, as well as the presence of nuisance bacteria.

> Cancer rates for the Ackerville Zip Code are not elevated when compared to statewide rates or the neighboring Richfield Zip Code.
>
> Because there was has been very little human exposure to contaminants of concern at this site a more thorough evaluation of health outcome data is not warranted.

(Ex. 1035, p. 8; R. 10151) The assessment also includes the following inquiry and response;

> Is it true that the bridge construction project will make groundwater contamination worse in our area? No. There is no relationship between the proposed bridge construction project and area groundwater quality. The groundwater is 30 feet below the ground surface and will not be affected by the bridge or road construction.

(Ex. 1035, p. 11; R. 10154)

By a letter dated February 27, 2002, WDOT Secretary Gene E. Kussart, responded to a January 2002 request by Wisconsin State Representative Suzanne Jeskewitz. Kussart advised that the WDOT would accommodate her request to install additional monitoring wells in the immediate vicinity of the project. (Ex. 1036) Kussart's letter noted that data from the new monitoring wells would be provided to the WDNR. However, he also stated that "[b]ased on the judgments of our experts and those within the DNR, we continue to believe the presence of groundwater contaminants, if detected, should have no impact on project activities." *(Id.)*

STS Consultants Ltd., 11425 West Lake Park Drive, Milwaukee, Wisconsin 52224, was contracted to complete the new well installation and monitoring discussed in Kussart's above-noted letter of February 27, 2002. (Ex. 1037; R. 10081-10085) The purpose of the work they were engaged to complete was as follows:

> The purpose of the well installations and groundwater monitoring is to determine potential impacts of upgradient groundwater contaminant sources on areas of bridge pile support installation.

(Ex. 1038; R. 10086-1 0087) More specifically:

> Our proposal to install monitoring wells in Ackerville will cost $32,000. The following paragraphs detail the proposal. We are in the process of drafting the reply letter to the legislators and will have it to you by the middle of next week.
>
> We are proposing to install and monitor three nests of wells approximately 350 to 500 feet apart along the west right-of-way of STH 164 (Lovers Lane Rd) in Ackerville. The wells would be located on the north and south sides of the railroad corridor and just south of STH 175 (the contamination is located between the railroads and STH 175 and would be expected to move southeasterly towards the railroads). The wells would be tested at installation and quarterly for a two-year period after the piling is driven. The samples would be tested for water level, conductivity, temperature, VOCs (with TCE the target analyte), and dissolved arsenic. Installation of wells on the east side of STH 164

> is expected to double the price above. It would cost $1,500 to abandon the three nests of wells. The cost for abandonment is not included in the $32,000 figure. We are recommending that the wells be left in place and not be abandoned after the two-years are up.
>
> All results will be turned over to the DNR.
>
> * Each nest would consist of two wells, one being a water table well (10 feet into the water table) and the other a piezometer well (35 feet into the water table). The upper water table limits are about 30 feet below ground. The piling is expected to be driven no more than 45 feet into the water table. All wells would have locking protective caps.

(Ex. 1039; R. 10120; Ex. 1039A; R. 10119)

By e-mail dated April 24, 2002, Wade of WDOT reached various conclusions from the initial sampling results that STS Consultants obtained from the new monitoring wells. That e-mail included the following statements:

> The WDOT contractor, STS Consultants, has completed installation and the first round of sampling of three pairs of groundwater monitoring wells installed in the Ackerville area of the STH 164 highway project. The wells were installed along the west side of the right of way adjacent to areas planned for bridge pile installation.
>
> ...

Conclusion

The confirmation of permeable aquifer materials, upward hydraulic gradients, low contaminant concentrations, and lack of any apparent contaminant source in the immediate project area all reinforce our earlier conclusion that project construction activities, including the driving of piles, will have no significant impact on the continuing migration of the contaminants in the project area. No modification of highway project should be required.

Further Course of Action:

1. Provide draft of monitoring report to Jim Delwiche, Chad Czarkowski, and Phil Fauble of WDNR for their review and comment. We will advise them of the current project construction schedule that includes a May 6th start date and request a response by Friday May 3rd. A draft report will also be provided Charles Warzecha, Wis. Health and Family Services.

2. After receipt of the DNR comments the report will be finalized and provided to the state personnel above, affected state legislators, project manager, and John Thresher (SURE hydrogeologist).

   WDOT will continue groundwater monitoring for another 8 quarters (two years) and report the results quarterly to the WDNR.

(Ex. 1040; R. 10093)

In a May 2, 2002, memorandum, Fauble of the WDNR, stated that he reviewed STS Consultant's data regarding the new monitoring wells. He noted that "[n]one of the data presented in this draft report in any way contradicts the WDNR's, findings in the memo to the WDOT dated August 23, 2000[the actual date of the memo is August 22, 20001, which states, "Our conclusion is that the road project will not have any substantial effect on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to groundwater contamination in the vicinity." (Ex. 1041; R. 10091-10092).

Given his review of the results of STS Consultants' work, Fauble concluded as follows:

> In summary, the data presented in the draft report shows that there are very low levels of VOC contamination present in the shallow groundwater beneath the site. However, there were no detects of arsenic in any well. The TCE levels are well below the State's enforcement standards and are consistent with very low level TCE source originating northwest of the site, near the railroad yard. The trichloromethanes are likely the result of chlorinated municipal water that was introduced by the well construction. The very low-level gasoline-range VOC detects are likely the result of small roadside spills or introduced during sampling.

(*Id.*)

STS Consultants, Ltd., in a letter dated August 1, 2002, provided documentation of groundwater sampling activities completed at the new monitoring

wells as of July 2002. (Ex. 1042; R. 14863-14871) It does not appear that any of the results exceeded the NR 140 Enforcement Standard. (Ex. 1042; R. 14863-14871) Results of STS Consultants' monitoring of the new wells in October 2002 are set forth in a document dated November 14, 2002. (Ex. 1046)

By a memorandum dated November 21,2002, Art Bauman of WDOT noted: "Attached for your review is a copy of the monitoring well results for the samples taken in October 2002. The results show that the TCE levels are all well below detectable limits. Arsenic values have increased in two wells, but all are below the DNR Prevention Action Limit. We continue to believe that the Lovers Lane Project will not have any impact on the groundwater in the Ackerville area." (*Id.*)

The construction of the project, including the insertion of the pilings into the ground, began in May of 2002. (Defendants' Surreply to the Plaintiff's Reply, p. 3; (Ex. 1043, entry 18)) The project called for a total of 177 pilings to be inserted into the ground. *(Id.* at p. 1) When plaintiff filed this lawsuit on July 3, 2002, 150 of the 177 pilings, or 84% of pilings for the project, had been inserted into the ground. (Defendants' Surreply to Plaintiff's Reply, p.1; (Ex. 1043, entry 18))

Plaintiff submitted four (4) explanations for its failure to commence this action before or soon after construction began, and before 84% of the pilings had already been inserted into the ground. (Plaintiff's Reply, pp.15 & 16; (Ex. 1043, entry 14)) Those explanations are:

> 1. Administrative efforts that they made prior to filing suit in connection with having further review of the pilings conducted;

2. Some review of testing was set forth in a report that was not issued until May 2, 2002;

3. The plaintiff's "had to hire replacement counsel and did so during the second week of June 2002."; and

4. In mid-June of this year, plaintiff's current counsel advised counsel for one of the defendants that the plaintiff would be seeking a temporary restraining order.

(*Id.*)

B. WDOT Project 2748-01-01

The second project is identified as Project I.D. 2748-01-01. On April 9, 2001, a final Environmental Impact Statement (EIS) for this project was approved by the Federal Highway Administration for distribution to agencies and the public. (Ex. 1045, p. III) On March 6, 2002, the FHWA adopted the selected alternative that was set forth in the EIS for "WisDOT Project 1.D. 2748-01-01." (*Id.* at 12) The EIS includes the following information about that project:

Location

The 18-mile (29-km) County J/WIS 164 study corridor extends from Rockwood Drive north of 1-94 in Waukesha County to a point north of County E in Washington County. At its northern terminus, the County JIWIS 164 project abuts the Lovers Lane Road project, previously approved by the Federal Highway Administration (FHWA). See location map

inside front cover, and discussion on project termini in Section 1, "Purpose of and Need for Proposed Action.["]

Proposed Action

The Wisconsin Department of Transportation (WisDOT), in consultation with the Federal Highway Administration (FHWA), is studying alternatives for providing additional highway capacity in the County J/Wis 164 corridor in accordance with recommendations in regional and county transportation system plans. County J/Wis 164 is a principal arterial highway serving adjacent development and local traffic in the City of Pewaukee, Villages of Pewaukee and Sussex, and Towns of Lisbon, Richfield, and Polk, as well as providing a regional transportation connection between I-94 and US 41 (via WIS 60). The *2020 Regional Transportation System Plan* and *Jurisdictional Highway System Plans* for Waukesha and Washington counties document the need for additional capacity on County J/WIS 164 to address existing and future traffic demand along a corridor that is transitioning from rural to urban/suburban development.

Key objectives for proposed improvements to County J/WIS 164 include the following:

- Address present and emergency safety concerns including congestion, traffic conflicts at numerous access points, and geometric deficiencies such as poor sight distance at several hills

- Provide a recommendation plan to guide future land use and development decisions and to preserve land needed for potential future highway improvements

- Improve local and through traffic access to adjacent development as well as to destinations outside the corridor

- Serve traffic demand generated by existing and planned development along the highway as well as in the surrounding region

The need for improvements is demonstrated through a combination of the factors described below.

Traffic Demand

Traffic on County J/WIS 164 is expected to increase by 60 percent or more within the project's planning period (design year = 2025). WisDOT uses 13,000 Average Daily Traffic (ADT) as the threshold volume that can be safely handled at an acceptable level of service on a 2-lane suburban highway. In Waukesha County, traffic currently exceeds this threshold in the I-94 to Capitol Drive and County VV to Plainview Road segments. Based on projected development and traffic trends, the threshold is expected to be reached on all Waukesha County segments by 2025. All Washington County segments are below the threshold and are expected to remain so through 2025 unless development exceeds the intermediate level envisioned in the regional and county transportation system plans.

Today's average daily truck volumes range from 250 (lowest volume segment) to 715 (highest volume segment). In 2025, truck traffic is expected to reach 415 to 1,150 per day. The Waukesha County portion of the study area operates at maximum capacity during morning and evening peaks. Under forecast traffic for 2025, the entire highway will be at maximum capacity during peak hour traffic conditions.

Existing Deficiencies

At numerous locations, the vertical profile does not meet stopping sight distance for posted speed limits, and there are over 300 access points that contribute to traffic operation and safety concerns. Cross traffic and turning traffic combined with speed changes and lack of auxiliary lanes, reduces operational efficiency, capacity, travel speed, and safety. The at-grade railroad crossing just north of County VV warrants a grade separation based on an exposure factor that exceeds national criteria.

Safety

During the period 1996 through 1999, 269 crashes occurred on County J/WIS 164. Highway mainline crash rates in the Rockwood Drive to County M segment exceeded statewide average rates for similar roadways for all sections of the corridor and not the Rockwood to CTH "M" section in 1999; the County M to Lisbon Road segment exceeded statewide rates in 1996 through 1999; the County Q to WIS 167 segment exceeded statewide rates in 1998. There were two fatal crashes in 1999; one at the Hubertus

> Road intersection, and one south of the Monches Road intersection. The County M intersection had a crash rate above the national intersection crash rate in 1999, the Capitol Drive intersection was above the rate in 1997 and 1998, the County VV intersection was above the rate in 1999, and the County E intersection was above the rate in 1996.
>
> **Corridor Preservation**
>
> Corridor preservation will be an important tool for protecting land needed for future highway improvements on portions of County J/WIS 164 where the 13,000 ADT threshold for capacity expansion is not expected to be reached by 2025. The County J/WIS 164 study will provide functional highway plans that can be used by local governments as a blueprint for making land use and development decisions that preclude or minimize disruption to established and planned community facilities.

(Id, at ¶ IV - VI) Plaintiff opposed "Project I.D.2748-01-01" as a "second part" of the above-noted Project I.D. 2748-01-00. (See Plaintiff's Brief on the Merits, p. 5; Complaint ¶ 9)

CONCLUSIONS OF LAW

A. Standing

To bring suit in federal court, a plaintiff must have standing to raise its claim. *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F. 3d 517, 527 (7th Cir. 2001). Defendants did not challenge standing, but the court must address the issue regardless of whether the

parties have, see *Rhodes v. Johnson,* 153 F.3d 785, 787 (7th Cir. 1998). Establishment of standing requires a plaintiff to show (1) that it has suffered an injury in fact, (2) caused by the defendant, (3) that a favorable decision will likely redress. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Tobin for Governor,* 268 F.3d at 527. When the plaintiff is an association, the standing test is modified somewhat. The plaintiff must demonstrate (1) at least one member would have standing on his or her own, (2) the interests that the association seeks to protect are germane to its purpose, and (3) "'neither the claim asserted nor the relief requested requires the participation of individual members.'" *Retired Chi. Police Ass'n v. City o f Chi.,* 7 F.3d 584, 600 (7th Cir. 1993) (quoting *Hunt v. Wash. Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)). Plaintiff bears the burden of proof and must support each element "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Alliant Energy Corp. v, Bie,* 277 F.3d 916, 919 (7th Cir. 2002). Thus, at the preliminary injunction stage, plaintiff must show that it has a reasonable likelihood of demonstrating each element of standing.

Here, plaintiff is an unincorporated association of Waukesha and Washington Counties residents "who are concerned about the potential destruction of the region." Members are "committed to preserving the beauty, tranquility and environment of the area" and include persons "whose water supply is threatened with contamination from arsenic and TCE as a result of the proposed Ackerville bridge project." Contamination of members' water supplies is an injury in fact which will, if plaintiff's theory holds, be caused by the defendants. This harm will be redressed, at least

partially, if plaintiff receives the relief it seeks because removing and/or grouting the pilings will stop further contamination. Thus, at least some of plaintiff's members have a reasonable likelihood of showing standing to sue as individuals. As for the association, stopping the bridge construction is germane to its purpose. Indeed, the organization was created to oppose the greater highway construction project of which the bridge is a component. Finally, the claim asserted and the equitable relief sought do not require the participation of individual members. Thus, plaintiff association has a reasonable likelihood of demonstrating that it has standing.

B. Plaintiff's Delay in Seeking Relief

First, defendants argue that the doctrine of laches bars plaintiff's claims, and/or that the case is moot. Laches applies when a "plaintiff has waited for an unreasonable length of time to assert his claim and the defendant has been prejudiced by the delay." *Horbach v, Kaczmarek*, 288 F.3d 969, 973 (7th Cir. 2002). Along the same lines, NEPA claims have been rejected based upon substantial completion of projects. *See Environmental Rights Coalition, Inc. v. Austin*, 780 F. Supp. 584, 587 (S.D. Ind. 1991), citing *South East Lake View Neighbors v. Department of Housing and Urban Deve/opment*, 685 F.2d 1027, 1039 (7th Cir.1982) (denying relief under NEPA where "building [was] in the final stages of construction"); *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 941 (5th Cir.1982) ("the basic thrust of the NEPA legislation is . . . not to serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction"); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir.1978) (denying post-completion relief on mootness grounds

because the court did not have authority to "undo what has already been done"); *Ogunquit Village Corp. v. Davis*, 553 F.2d 243, 246 (1st Cir.1977) (denying "post-completion relief.")

Plaintiff has battled this project for years. Gonyo, a representative of the plaintiff, prepared "The Bridge To Nowhere Fact Sheet" in February of 2000, and made repeated FOIA requests as early as June of 2000. Bridge pilings were inserted into the ground starting in May 2002. Yet, plaintiff did not file a complaint until July 3, 2002, when a total of approximately 150 pilings (or 83%) had been inserted. Defendants argue that if plaintiff believed that grouting around the piles could avert or lessen environmental harm, it should have sought relief long before the vast majority of the pilings were inserted. At the hearing before this court on the merits of plaintiff's claims, defendants represented that the Ackerville Bridge/Lovers Lane Reconstruction project is "substantially complete" and will open in mid-June.

Regardless, under the circumstances of this case, the court declines to hold that the plaintiff is barred by any delay in filing this suit or that the case is moot because one of the two projects at issue is substantially complete. First, NEPA ensures compliance with a process, and alternative remedies remain available to the plaintiff. This court could order the defendants to prepare an EIS or Supplemental EIS for all of the County J/Highway 164 project to further assess the environmental impact, and/or order the defendants to grout the length of the pilings. To hold otherwise would suggest to agencies that they could rush to construction and thereby avoid compliance with NEPA requirements. Second, plaintiff seeks an injunction preventing defendants from widening

County J/Highway 164 from I-94 in Waukesha County to STH 60 in Washington County from two lanes to four lanes, and that project could still be enjoined.

Finally, plaintiff has documented its administrative efforts to have the contamination issues considered before filing suit. As recently as February 2002, plaintiff was successful in getting a commitment from the WDOT for further testing. Testing was conducted in early April 2002 with a report issued May 2, 2002. The driving of the pilings began in May. At or about that time, defendants were notified that plaintiff intended to file suit and plaintiff hired replacement counsel. Also, at the July 19, 2002, status conference, Attorney Remington and AUSA Guadagnino represented to the court that defendants planned to continue with the construction of the project pending the court's ruling and would assume the risk of having to remove portions of the constructed project to conduct grouting, if ordered. Defendants made a calculated decision to assume the risk of going forward, and any prejudice to the defendants is not the result of plaintiff's inaction. Consequently, the court turns to the merits of plaintiff's claims.

C. Project I.D. 2748-01-00

Plaintiff is required to show that defendants acted arbitrarily and capriciously in finding that the Ackerville Bridge/Lovers Lane Reconstruction Project would have no significant impact and, thus, declined to issue an EIS. In challenging an agency's action under NEPA, the plaintiff bears the burden. *Sierra Club v. Marita,* 46 F.3d 606, 61 9 (7th Cir. 1995). The court's review is limited to the administrative record.

Plaintiff argues that the defendants failed to consider adequately the effect of the bridge pilings on TCE in the groundwater and soil and on arsenic contamination. The EA shows that the agency considered the TCE and concluded that the project will not effect groundwater adversely because (1) the TCE level in the closest monitoring well was below the WDNR standard and dropping and (2) construction would not reach the groundwater, which is at a depth of thirty feet. However, the EA, FONSI and supporting documents contain no mention of the pilings; and it is undisputed that the pilings reach a maximum of eighty feet, well below the water table. Thus, the EA and FONSI do not indicate whether the defendants considered what effect driving pilings eighty feet into the ground would have on the TCE present in the soil and groundwater.

There are few mentions of pilings in contemporaneous documents. The Phase 1 Addendum states that it is "unlikely that pilings for the structure supports . . . will cause an impact on plume movement or concentrations." (R. 1015, 00714) Defendants represent that the Phase I Addendum is one of the reports that EMCS, Inc., used to conclude that there would be no hazardous materials impacts occurring as part of the proposed project. In addition, the March 14, 2000, letter to EMCS from the WDOT District 2 Hazardous Materials Engineer states that it "is also unlikely that project pilings or water detention/infiltration basins will cause an impact on plume movement or concentrations." (R. 1009, 00728)

However, the evidence cited in the Phase 1 Addendum addresses the dropping concentration of TCE in the closest monitoring well. Because defendants admit that the actual depth of the pilings was not

known until June of 2001 (after the EA and FONSI issued), EMCS did not know the depth of the pilings when it prepared the addendum. Thus, its conclusion that no harm would result is suspect. In addition, the addendum was prepared at the direction of WDOT after the agencies had given preliminarily approval to the EA and FONSI.

On the other hand, plaintiff didn't raise its concerns about the pilings until the EA issued and was released for public comments. Even after the EA and FONSI issued, the FHWA continued to solicit comments and gather information in response to agency and public concern.

It appears that the parties are in agreement that the reviews conducted after the FONSI was issued but before the construction began should be viewed as supplements to the administrative record of the project. *See Lakes Region Legal Defense Fund, Inc. v, Slater*, 986 F. Supp. 1169, 1196 (N.D. Iowa 1997) ("A formal 'supplemental EA' has not been prepared for the case. However, the administrative record indicates that the defendants have continued to review the impacts associated with changed conditions in the Highway 71 project . . . [t]he defendants have fulfilled their obligation under NEPA by continuing to review potential impacts resulting from the Highway 71 project.").

WDOT inquired into the effect of the pilings on the TCE plume by soliciting information from WDNR. The August 22, 2000, WDNR memorandum ("the WDNR memorandum") is a two-and one-third page, single-spaced document concluding that driving pilings below thirty feet will neither significantly alter the flow of groundwater, which already moves vertically and

horizontally, nor introduce additional contaminants. With specific reference to driving pilings deeper than thirty feet, the authors state:

> Driving pilings to depths greater than 30-feet could potentially encounter contaminated groundwater. However, such vertical steel pilings would not, in themselves, contribute any additional contaminants to the groundwater, nor significantly alter flow along any horizontal plane. Theoretically, the flow of groundwater could be altered along vertical lines due to the penetration of a piling thru lenses or layers of dense, clayrich soil known as "confining layers" or aquatards. Such layers, if present, normally act to prevent downward or upward movement of groundwater. A piling might compromise a confining layer by creating a narrow (0.5"-3" maximum) concentric space along the outside shaft of a piling or casing.
>
> However, we believe the placement of pilings will not significantly affect groundwater conditions on this project. As documented by well logs and soil borings, there is no effective, continuous layer in the project area. Without any effective separation of the shallow sand and gravel aquifer from the deeper dolomite aquifer, groundwater already moves freely along vertical planes. In fact, several well nests near the proposed project record consistent upward gradients, an indication that deeper aquifer water is discharging into the shallower system. The relatively small increase in vertical groundwater movement which might be expected along open spaces surrounding even

> several dozen pilings is insignificant compared to the quantity of natural vertical movement.

To reach this conclusion, the authors state that they looked to evidence from private drinking water and groundwater sampling, well construction log data and soil borings, recounting this data in some detail. E-mail messages filed by defendants and attached to the WDNR memorandum indicate that WDOT and FWHA relied on the WDNR memorandum to find that the pilings would have no significant impact on the environment and, thus, determined that the FONSI remained valid and no further inquiry was needed.

In addition, both the WDOT and WDNR reviewed STS Consultant's initial sampling results obtained from the monitoring wells. The Hazardous Materials Engineer for the Environmental Team Transportation District of WDOT concluded:

> The confirmation of permeable aquifer materials, upward hydraulic gradients, low contaminant concentrations, and lack of any apparent contaminant source in the immediate project all reinforce our earlier conclusion that project construction activities, including the driving of piles, will have no significant impact on the continuing migration of the contaminants in the project area. No modification of highway project should be required.

(Ex. 1040; R. 10079)

Similarly, Fauble of the WNDR concluded:

> In summary, the data presented in the draft report shows that there are very low levels of

> VOC contamination present in the shallow ground water beneath the site. However, there were no detects of arsenic in any well. The TCE levels are well below the State's enforcement standards and are consistent with very low level TCE source originating northwest of the site, near the railroad yard. The trichloromethanes are likely the result of chlorinated municipal water that was introduced by the well construction. The very low-level gasoline range VOC detects are likely the result of small roadside spills or introduced during sampling.

(Ex. 1041; R. 10092)

Since that time, STS has continued to monitor the wells, and sampling was conducted as recently as July and October of 2002. As Art Bauman of the WDOT noted, the most recent results show that TCE levels continue to be "well below detectable limits." Arsenic levels have increased in two of the wells, but are below the DNR Prevention Action limit. These results are consistent with a Wisconsin Department of Heath and Family Services document dated February 26, 2002, entitled "Public Health Assessment for Ackerville Area Groundwater," which concludes that there is limited groundwater contamination in the Ackerville area west of the intersection of Highways 164 and 175 and little exposure to contaminants of concern at this site.

Finally, defendants offered documentation showing that the OCR later conducted a public hearing and issued an EA and FONSI addressing the same project. At the OCR public hearing, citizens and experts offered testimony in opposition to the project and directly addressed the effect of the pilings on the landfill leachate. The OCR rejected this testimony on

the ground that it was inconsistent with the defendants' EA and WDNR Memorandum.

Plaintiff disputes each of these findings, and relies heavily on the opinion of its expert, John Thresher, Jr. Thresher has prepared a two-volume evaluation of groundwater contamination in the Ackerville area, and addresses the potential impact of Highway 164 Reconstruction on Groundwater Contamination. Many of the facts included within the two-volume evaluation were raised by the plaintiff as early as the March 23, 2000, public hearing and considered by the agencies in the post-Fonsi review period.

However, agencies are entitled to rely upon their experts, and certainly the authors of the August 22, 2000, memorandum (Chad Czarkowski and Phil Fauble) appear to be specialists in their field. Plaintiff does not attack the qualifications of Czarkowski or Fauble, set forth in Docket No. 29. Fauble is a Senior Hydrogeologist with the Southeast Region Waste Management Program and has been employed by the Department of Natural Resources since September 1990. He is a Wisconsin Registered Professional Geologist, and is responsible, in part, for conducting inspections of existing and closed landfills for compliance with NR 140 (State groundwater standards) and plan conditions. Czarkowski is a Southeast Region Drinking Water & Groundwater Program Expert and has been employed by the Department of Natural Resources since August 1979. He is a Wisconsin Registered Sanitarian, Wisconsin Certified Soil Tester and Morphological Evaluator (CST) and Wisconsin Certified Waterworks and Wastewater Operator.

Formally supplementing the EA after the depth of the pilings was known would have been a more thorough means of assessing the impact of the pilings. However, FWHA regulations do not require such action. FWHA regulations state that "[a]fter approval of the . . . FONSI . . ., the applicant shall consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental documents . . . remains valid for the requested Administration action." 23 C.F.R. § 771.129(c). In other words, when a project changes, the agency must reevaluate the environmental consequences to determine whether the FONSI remains valid, and need only supplement the EA if the FONSI is found invalid. *Price Rd. Neighborhood Ass'n v. United States Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997).

Here, defendants reevaluated the project by soliciting information from the WDNR about the effect of the pilings. Based on this information, memorialized in the WDNR memorandum, the defendants determined that the FONSI remained valid. By addressing the impact of the pilings in this fashion, it appears that defendants took a "hard look" at the project and the pilings in particular as required. Remanding the actions to the agency for reconsideration of this issue would be futile. *Cronin*, 919 F.2d at 443 (stating that the court need not remand a case if doing so would be futile).

One troubling concern is the defendants' apparent failure to hold a public hearing on the project once the planned depth of the pilings was known. Active public involvement in government decision-making affecting the environment is one of the primary goals of the NEPA. *Robertson v. Methow Valley*

Citizens Council, 490 U.S. 332, 349 (1989). However, the FWHA regulations provide that when a reevaluation is conducted, "the FWHA and the State highway agency will determine whether the changes in the project or new information warrant additional public involvement." 23 C.F.R. § 771.111(h)(3). Given the degree of controversy this project had aroused, additional public involvement might have been wise; however, the regulations did not require another public hearing. Moreover, the agencies considered written public comments before soliciting new information from WDNR. Indeed, a citizen's complaint spawned the inquiry. Thus, to a limited extent, the public involvement goal of NEPA was met.

Overall, the court is satisfied that the defendants took a hard look at the environmental consequences of the project, and that their determinations were not arbitrary and capricious.

D. Consideration of Alternatives for the Project

NEPA requires that alternatives to major federal projects be studied, and the completion of a detailed statement about the consideration that was given to those alternatives. 42 U.S.C. § 4332(2)(C)(iii) and (2)(E). Courts employ a "rule of reason" when determining whether an agency has adequately discussed significant aspects of the environmental consequences of a project and its alternatives. *City of Grapevine, Tex. v. Dept. of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir.), *cert. denied*, 11 5 S. Ct. 635 (1 994); *Citizens Against Burlington, Inc. v, Busey*, 938 F.2d 190, 195 (D.C. Cir.) (stating that the "rule of reason governs both which alternatives the agency must discuss, and the extent to which it must discuss them" (emphasis in original)), cert. denied, 502 U.S. 994 (1991

). An agency is not required to examine all possible alternatives to a proposed action. *Simmons v. U. S. Corps of Army Eng.*, 1996 WL 1323088 (S.D. Ill. 1996) The court's review is to determine only whether the agency took a "hard look" at other available options, see *Eagle Found. v. Dole*, 813 F.2d 798, 803 (7th Cir.1987), with the plaintiff having the burden of proof to demonstrate that the agency failed to do so. *See Sierra Club*, 46 F.3d at 606. The scope of the agency's inquiry must remain manageable if NEPA's goal of insuring a fully informed and well-considered decision is to be accomplished. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

Plaintiff submits that defendants have embarked on an alternative that will cost millions and jeopardize Ackerville's drinking water to address an alleged future need for four highway lanes that "won't be needed for 25 years or more." According to plaintiff, safety concerns could have been addressed by adding gates to the railroad crossing nearby and installing traffic lights at the intersection of WIS 175 and WIS 164. Concern about traffic backing up at the intersection could have been resolved by integrating the railroad crossing gate signal with the traffic signal.

The relevant portions of the FONSI belie plaintiff's argument. It not only summarizes the consideration given to a number of alternatives, but addresses plaintiff's preferred solution:

> **Alternatives proposed by the public:**
>
> **1. Re-align intersection at STH 164/STH 175 to a right angle, reduce the steep hills along the STH 164 and STH 175, add traffic gates at the**

railroad crossings, and add signals at the STH 164/STH 175 intersection.

Substantial impacts to the town of Ackerville would occur by re-aligning either roadway. Adding gates at the railroad crossings would not address the fact that there are currently long delays due to the amount of train traffic here. This will only worsen in the future since Wisconsin Central Limited has plans to double the train traffic on these lines. The installation of signals does not guarantee increased safety. The close proximity of the railroad tracks to the intersection may cause traffic to back-up past the tracks while waiting to clear the intersection. This proposal does not address the need for the project in regards to upgrading Lovers Lane Road to state trunk highway standards. The 11% grade just north of the intersection, inadequate shoulder widths, poor pavement structure, and the inadequate stopping sight distances throughout the project are all substantial features of this highway which are not addressed. Also, the need for future expansion to 4 lanes has not been addressed.

2. Purpose and need of the proposed action. Include description of existing facilities, abutting facilities, and how the action links into the overall transportation system. When appropriate, show that commitment for future work is not being made without evaluation, and that viable alternatives in a larger framework are not being unduly foreclosed.

The Wisconsin Department has acquired jurisdiction of Lovers Lane Road as part of a larger jurisdictional transfer process involving County Highway J in Washington and Waukesha Counties. The existing facility does not meet standards for a State Trunk Highway including sight distance, pavement and shoulder widths, and clear zone requirements. The pavement structure from STH 175 to STH 60 is inadequate to support truck traffic, thus trucking is restricted from this segment of roadway. The roadway surface north of STH 175 is in good condition due to a maintenance resurfacing placed in 1992. However, prior to resurfacing, the existing roadway had experienced sever frost damage and alligator cracking throughout the project length. The roadway was advisory signed as a rough road, and residents and county maintenance officials reported the presence of tree stumps in the roadway fill and subgrade. The existing shoulder width north of STH 175 varies from two (0.6 m) t o four feet (1.2 m), which is less than the standard 10-foot (3-meter) minimum for a rural State Trunk Highway. The intersection of Lovers Lane and State Highway 175 is a high accident location with accident rates exceeding the statewide accident rate. In 1998, there were 11 accidents at the intersection of STH 164/STH 175. The 1998 accident rate was over three times the statewide average for rural State Trunk Highways. Also associated with this intersection is the close proximity of the railroads which may cause traffic to backup to the railroads while waiting to move through the intersection.

3. Summary of the alternatives considered and if they are not proposed for adoption, why not. (Identify which; if any, of the alternatives is the preferred alternative.)

a. No-Action: Under the No-Action alternative, no improvements would be made to the existing roadway except routine maintenance and resurfacing. Other than temporarily improving the pavement surface, this alternative does not address the identified deficiencies of the existing facility.

While the No-Action alternative does not meet the purpose and need for the project, it does serve as a baseline for a comparison of impacts related to the recommended alternative.

b. Recommended Alternative: The proposed alternative consists of reconstructing the existing 2-lane roadway from a point 0.8 km (0.5 mi) south of State Highway 175 to State Highway 60. The southern 0.97 (0.60 mi) would follow the existing alignment and consist of a rural section with ditches. The northern 1.2 km (0.74 mi) would be offset 8.22 m (27 ft) east of the existing alignment and consist of an urban section with curb and gutter.

An overpass structure is proposed at the Wisconsin Central Limited and the Wisconsin Southern Railroads in order to remove the existing at-grade railroad

crossings. As a result of eliminating these at-grade crossings, a new road (Sherman Road/Fond du Lac Drive connection) will be constructed along the southern railroads right-of-way. This roadway will also pass under the structure at the railroads. Additionally, an overpass structure is proposed at State Highway 175. The vertical profile of the roadway would be raised at these structures with a maximum change of 9 m (30 ft).

A connection road would be built to provide for traffic movements from Lovers Lane Road to State Highway 175. This roadway would be located in the northwest quadrant of Lovers Lane Road and State Highway 175.

Right of way requirements vary throughout the project. The right of way to be acquired along Lovers Lane Road would be sufficient to accommodate a future 4-lane roadway with a 15 m (50 ft) median through the rural section and a 9.1 m (30 ft) median through the urban section.

c. Other alternatives considered:

- Shifting the alignment to the east or west of the existing - Shifting the alignment to the east or west resulted in the displacement of up to three additional residential buildings as well as up to approximately three acres of additional right-of-way

requirements while providing negligible benefits

- Constructing the entire length of Lovers Lane with a rural or urban section - The rural section at the north end of the project would require additional right of way and displace two additional residences while the urban section at the south end would also require additional right of way due to the fill conditions and also posed a safety concern with the curb and gutter required with a posted speed limit of 90 km/h (55 mph)

- Maintaining an at-grade crossing with the railroads - This alternative was dropped due to serious safety concerns.

- Providing a connection route for Fond du Lac [D]rive and Sherman Road with direct access to Lovers Lane Road - due to the high fills required for the' overpasses at the railroads, this alternative was not cost effective relative to the limited benefits received.

Plaintiff's assertion that the future expansion was the primary motivation and its dismissal of safety considerations is not supported by the record. Defendants prepared an Accident Analysis Report for the project, which supports the defendants' emphasis on safety. The Report states in part, that from 1999 to

2000, 35 accidents occurred along this stretch of Highway 164. The two-year average is 344% greater than the 1999 statewide average rural rate of 177. Further, excluding deer crashes the two-year average of crashes was 696 crashes per 100 million vehicle miles, which is 510% greater than the 1999 statewide average rural rate of 114. The majority of these crashes, (23 of 35) took place at the intersection of STH 164 and STH 175. (R. 1104, 05409-05415) Similarly, plaintiff has not supported its assertion that any safety concerns could have been alleviated by installing traffic lights and gates at the nearby railroad crossing. The court is satisfied the defendants took a hard look at this alternative and made a fully informed decision to proceed with the alternative involving the overpass structure.

E. Segmentation

"[I]mproper segmentation" has been defined as an attempt by an agency to divide a major federal action into smaller components to allow those smaller components to escape the application of NEPA. *See, e,g., Scottsdale Mall v. State of Ind.*, 549 F.2d 484 (7th Cir.1977); *Swain v. Brinegar*, 542 F.2d 364 (7th Cir.1975) (en banc). "Segmentation analysis functions to weed out projects which are pretextually segmented, and for which there is no independent reason to exist. When the segmentation project has no independent jurisdiction, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." 23 C.F.R. § 771.111(f) (2000). "Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit

federal funds for closely related projects." *Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F.2d 11 29, 1140 (5th Cir. 1992). "In the context of a highway within a single metropolitan area, as the case at issue - as opposed to projects joining cities - courts have focused more on the factor of 'independent utility.'" Id,; *see also Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (noting that courts focus more heavily on the independent utility factor).

According to plaintiff, defendants have admitted that the terminus of the Highway 164 project is sometimes stated as County E and other times as a hilltop north of County E. Plaintiff contends that the logical terminus is Hwy. 60, not an artificial part on a hilltop 1.3 miles south of Hwy. 60. Hence, plaintiff submits that by segmenting the project, defendants did not have to prepare an EIS for the 1.3 mile roadway that is directly in the path of a contaminant plume.

The court is not persuaded by plaintiff's arguments. As stated in Basic Sheet A of the FONSI, the main purpose and immediate need for the STH 175 to STH 60 project is to correct a safety problem at the STH 164/STH 175 intersection, correct a hazardous at-grade train crossing on STH 164 by building a bridge to cross over the train tracks and reconstruct the existing 2-lane roadway to correct the deteriorating pavement situation. Because the bridge corrects a hazardous at-grade track crossing problem, it was logical to establish the southern terminus for the project at a location after the bridge touchdown point where the reconstructed two-lane portion of STH 164 and the proposed four-lane roadway taper. *See, e.g. Village of Los Ranchos de Albuquerque v, Barnhart*, 906 F.2d 1477, 1483 (10th Cir. 1990). Moreover, neither the bridge project nor the Highway 164 road widening project requires other

projects to be usable, and neither precludes or excludes future roadway projects. Because the role of this court is not to determine the best way to complete a project, but to ascertain whether the defendants made a reasonable decision in establishing project termini, plaintiff's arguments fail. As noted earlier, the defendants' decision was reasonable and will not be upset.

Now, therefore,

IT IS ORDERED that plaintiff's motion for a preliminary injunction (Doc. #3) is denied.

IT IS FURTHER ORDERED that defendants' motion requesting the denial of the relief plaintiff seeks and judgment in defendants' favor (Doc. #34) is granted.

IT IS FURTHER ORDERED that this case is dismissed.

Dated at Milwaukee, Wisconsin, this 4th day of June, 2003.

BY THE COURT

S/

C.N. CLEVERT, JR.
U.S. District Judge

This 4th day of June, 2003, pursuant to Rule 77(d) Federal Rules of Civil Procedure, copies of this document were mailed by M. Jones to the following parties:

Attorney Robert B. Corris
735 N. Water St., Suite 1440
Milwaukee, WI 53202

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Milwaukee, WI 53202

Attorney Frank D. Remington
Wisconsin Dept. of Justice
P.O. Box 7857
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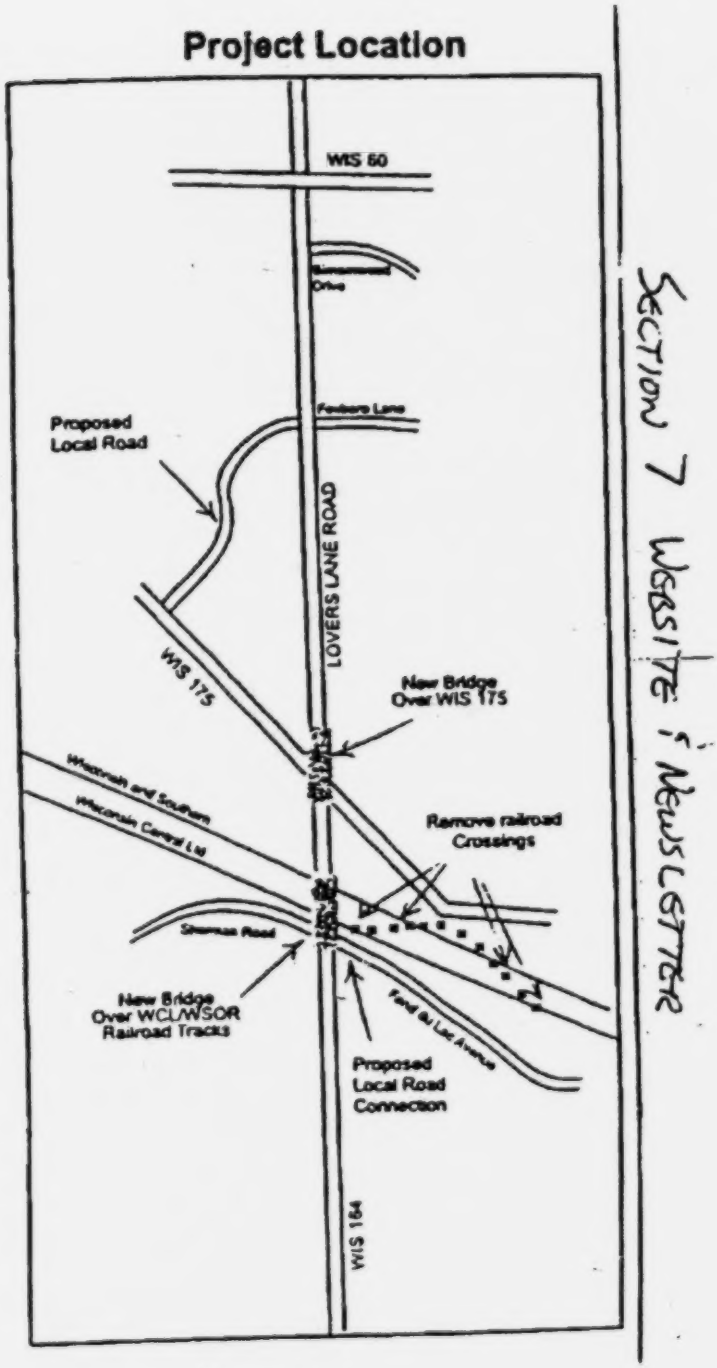
Madison, WI 53702

Exhibit A


Project Location
WIS 60
Proposed
Local Road
LOVERS LANE ROAD
WIS 175
New Bridge
Over WIS 175
Remove railroad
Crossings
New Bridge
Over WCL/WSOR
Railroad Tracks
Proposed
Local Road
Connection
WIS 164
SECTION 7 WEBSITE & NEWSLETTER

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 12, 2006

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 05-2667

HIGHWAY J CITIZENS GROUP and WAUKESHA COUNTY ENVIRONMENTAL ACTION LEAGUE,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, MARIA CINO, Acting Secretary of Transportation, FEDERAL HIGHWAY ADMINISTRATION, et. al.

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 05-C-212
Lynn Adelman, *Judge.*

ORDER

Upon consideration of Appellants' petition for rehearing en banc, filed on September 18, 2006, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

STATUTES AND REGULATIONS INVOLVED

United States Code
Title 42. The Public Health and Welfare
Chapter 55. National Environmental
Subchapter I. Policies and Goals

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [FN1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

[FN1] So in original. The period probably should be a semicolon.

Code of Federal Regulations
Title 40. Protection of Environment
+ Chapter V. Council on Environmental Quality
+ Part 1502. Environmental Impact Statement

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

Code of Federal Regulations
Title 40. Protection of Environment
+ Chapter V Council on Environmental Quality

+ Part 1508. Terminology and Index

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and
therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Code of Federal Regulations
Title 23. Highways
Chapter I. Federal Highway Administration, Department of Transportation
+ Subchapter H. Right-Of-Way and Environment

+ Part 771. Environmental Impact and Related Procedures

§ 771.111 Early coordination, public involvement, and project development.

****

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Code of Federal Regulations
Title 40. Protection of Environment
+ Chapter V. Council on Environmental Quality
+ Part 1502. Environmental Impact
§ 1502.9 Draft, final, and supplemental statements.

****

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

Seventh Circuit Internal Operating Procedures

Internal Operating Procedure 6. Panel Assignments in Certain Cases

****

(b) **Successive Appeals.** Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal. That panel will decide the successive appeal

on the merits unless there is no overlap in the issues presented. When the subsequent appeal presents different issues but involves the same essential facts as the earlier appeal, the panel will decide the subsequent appeal unless it concludes that considerations of judicial economy do not support retaining the case. If the panel elects not to decide the new appeal, it will return the case for reassignment at random. If the original panel retains the successive appeal, it will notify the circuit executive whether oral argument is necessary. If oral argument is scheduled, any visiting judge will be replaced by a member of this court designated by lot. Cases that have been heard by the court en banc are outside the scope of this procedure, and successive appeals will be assigned at random unless the en banc court directs otherwise.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP, U.A.,

Plaintiffs,

vs. Case No.

NORMAN MINETA, in his capacity as Secretary, United States Department of Transportation, FREDERICK WRIGHT, in his capacity as Executive Director, Federal Highway Administration; THOMAS E . CARLSEN, in his capacity as Acting Secretary, Wisconsin Department of Transportation,

Defendants.

COMPLAINT

The plaintiffs, by its attorney, Robert B. Corris of the law firm of Robert B. Corris, S.C., as and for its Complaint alleges and shows as follows:

Parties

1. Plaintiff, Highway J Citizens Group, U.A., ("Citizens") is a Wisconsin unincorporated association. Citizens is a citizens' group whose purpose, according to its mission statement is as follows:

> "The Highway J Citizens Group, U.A. represents residents of Waukesha and Washington County who are concerned about the potential destruction of the region along STH 164 and CTH J with a WisDOT proposed 4-lane highway (including the Ackerville Bridge Project proposal). Membership includes residents from Polk, Ackerville, Richfield, Lisbon, Sussex, Pewaukee (Village and City) and other surrounding communities. We are committed to preserving the beauty, tranquility and environment of the area and support an improved 2-lane road through our communities."

This purpose includes maintaining Highway 164 as a two-lane, scenic rural road and protecting the land and water in the area of the proposed Ackerville bridge from further contamination with arsenic and trichloroethylene(TCE) that is likely to result if construction of a proposed bridge (described below) goes forward. There are approximately 6000 members of Citizens, many of whom live along, and enjoy County Highway J (CTHJ) and State Highway 164 (STH 164), in its present state. Citizens includes in its membership persons who live in the area of the proposed Ackerville bridge and whose water supply is threatened with contamination from arsenic and TCE as a result of the proposed Ackerville bridge project. The defendants have officially recognized Citizens as a "party of interest" in both the STH 164/CTH J Reconstruction Study (Project ID #2748-01-01) and the Ackerville Bridge/Lovers Lane Reconstruction Project (Project ID #2748-01-00).

2. Defendant, Norman Mineta, is being sued in his capacity as the Secretary of the United States Department of Transportation ("USDOT"). USDOT is

headquartered at 400 7th Street SW, Washington, DC 20590.

3. Defendant, Frederick Wright, is being sued in his capacity as Executive Director of the Federal Highway Administration ("FHWA"). The Federal Highway Administration is headquartered at 400 7th Street SW, Washington, DC 20590.

4. Defendant, Thomas E. Carlsen, is being sued in his capacity as the Acting Secretary of the Wisconsin Department of Transportation ("WisDOT""). WisDOT is headquartered at 4820 Sheboygan Avenue, Room 120B, Madison, Wisconsin, 53707.

Jurisdiction and Venue

5. This action is brought pursuant to 28 U.S.C. § 1331 in that it is an action arising under the Constitution, laws, or treaties of the United States. Jurisdiction may also lie under 28 U.S.C. § 1346 in that the United States is a party. This action is brought pursuant to the Administrative Procedures Act, 5 USC §§ 701-706 and the National Environmental Policy Act, 42 U.S.C. §§4321 et. seq. ("NEPA"). Supplemental jurisdiction also exists under 28 U.S.C. § 1367 for claims based on violation of the Wisconsin Environmental Policy Act ("WEPA"), see sec. 1.11, Stats.; see Wis. Adm. Code Ch. TRANS 400 et seq.

6. Venue is proper in the United States District Court for the Eastern District of Wisconsin in that this is a cause of action that arises within this judicial district. Citizens' claims relate to the Ackerville Bridge/Lovers Lane Reconstruction Project in Washington County from STH 60 to a point on STH 164 approximately ½ mile south of the intersection of

STH 164 and STH 175. The Ackerville Bridge/Lovers Lane Project is approximately 1.34 miles long. Citizens' claims also relate to the WIS 64/County J Reconstruction Project as from I-94 in Waukesha County to a point at or near STH 60 in Washington County.

Identification of Project(s)

7. USDOT, FHWA, and WisDOT are proceeding with plans to widen CTH J/STH 164 from I-94 to STH 60 from two lanes to four lanes ("The Project"). A copy of a map showing The Project area is attached hereto and incorporated herein by reference as Exhibit 1. Parts of the former "County J" corridor between I-94 and STH 60 have been redesignated "STH 164" under jurisdictional transfer agreements between WisDOT and local governments. The segment from Capitol Drive to CTH Q was transferred to WisDOT in 1999; the segment from CTH Q to STH 175 was transferred in 1996; and the "Lovers Lane Road" segment from STH 175 to STH 60 was transferred in 1992. The segment between I-94 and Capitol Drive is still CTH J, but it will be transferred to WisDOT after it is reconstructed by Waukesha County.

8. One part of The Project is identified as Project I.D. 2748-01-00. A Finding of No Significant Impact (FONSI) was approved by various persons, including the defendants, between April 11, 2000 and April 25, 2000. According to the FONSI, the proposed action includes reconstruction of Lovers Lane Road from a point .5 mi south of STH 175 to STH 60. A further, and key, component of Project I.D. 2748-01-00 is the construction of the so-called "Ackerville Bridge" on STH 164 across railroad tracks and STH 175. Construction of the proposed Ackerville Bridge calls for

sinking a series of pilings as deep as 80 feet below ground surface.

9. The second part of The Project is identified as Project I.D. 2748-01-01. A Final Environmental Impact Statement (FEIS) was approved by WisDOT on December 10, 200l and by FHWA on December 11, 2001. The proposed actions include widening CTHJ/STH 164 from 2 lanes to 4 lanes. According to the FEIS, the termini extend from a 4-lane section near Rockwood Drive just north of I-94 to County E near Ackerville. However, in other places the northern teminus is defined as a point north of County E and which in fact is a hilltop at or near the Robert and Colleen Gindt family driveway.

10. Both Project ID #2748-01-00 and #2748-01-01 are major federal actions. Federal funds are a funding source for Project #2748-01-00 and the estimated project cost is $6,200,000.00. Project #2748-01-01 is also being funded with federal funds and the estimated project cost is approximately $63,000,000.00.

Groundwater Contamination in Ackerville

11. A closed Waste Management of Wisconsin (WMWI)-Polk landfill is located about 2,000 feet northwest of Ackerville. Landfill leachate has been leaking from the side and base of the landfill since it was constructed about 30 years ago. This leachate has contaminated the underlying groundwater which flows from the landfill site southeast, towards Ackerville and more specifically towards the proposed Ackerville Bridge.

12. As contaminated groundwater flows, the contamination spreads, or disperses, primarily in the

direction of flow, but also laterally, and to some extent vertically. The dispersed contamination is known as a contaminant plume.

13. The contaminant plume has grown, or spread, into the western part of Ackerville. By plotting the changes in parameter concentrations over time in site monitoring wells, it can be shown that the contaminant plume is slowly but continually spreading to the southeast and that the plume is significantly more extensive today than it was when modern, extensive monitoring began in 1986.

14. The two main parameters of concern associated with the contaminant plume are arsenic and trichloroethylene (TCE).

15. One way of measuring contaminant flow is to measure changes in specific electrical conductivity values. Specific conductivity is a parameter which indicates the location and movement of leachate from a landfill, because conductivity reflects the presence of dissolved salts and metals in the groundwater. Comparisons of the specific conductivity values from 1986 and 2001 demonstrate that the leachate is spreading southeast towards the intersections of STH 164 with the railroad tracks and with STH 175.

16. One of the contaminants in the leachate is arsenic. Comparisons of estimated arsenic concentrations, as revealed by DNR data from shallow piezometers (monitoring wells screened 20-30' below the water table) and private wells in the spring of 1986, the spring of 1993 and the spring of 2001, demonstrate that arsenic concentrations at or above the United States Environmental Protection Agency (EPA) arsenic health advisory levels have reached the intersection of

STH 164 and STH 175 and are approaching the intersection of STH 164 and the railroad tracks. In addition, arsenic concentrations exceeding both the EPA Maximum Contaminant Level and the DNR Enforcement Standard, have been shown to be spreading southeast from the landfill.

17. Further, the arsenic concentrations have increased significantly from 1988 through 1993, i.e., the concentrations are increasing over time. Groundwater test data evidences that arsenic concentrations are increasing as the contaminant plume moves towards the intersections where the Ackerville Bridge is to be built and that the arsenic is more concentrated at the deeper piezometer wells than it is at the surface.

18. TCE has been found in private and monitoring wells near STH 164. The levels of TCE have exceeded the EPA Maximum Contaminant Level, and the DNR Enforcement Standard, in some of the wells, and have exceeded the DNR Preventative Action Level in some other wells. In addition, breakdown products (vinyl chloride and dichloroethylene) of TCE have been identified in the landfill leachate.

19. The Lovers Lane/Ackerville Bridge project calls for driving piles up to 80 feet deep in areas that are in the direct path of the contaminant plume. Driving the pilings will result in disturbing the physical equilibrium of the soil grains resulting in the rotation and shearing of the grains. As a direct and proximate result of the pile driving, the area where the piles are being driven will become a highly permeable zone. The permeable zone around the piles will allow contaminants below the surface to mix with surface groundwater and vice versa, especially along the

leading edge of the contaminant plume where vertical hydraulic gradients fluctuate between upwards and downwards.

20. The defendants have not determined the configuration of the contaminant plume. Both as of the date when they issued the FONSI, and on information and belief today, they do not know either the vertical or horizontal degree and extent of the contaminant plume.

21. On information and belief, in early June 2002, the EPA requested the Wisconsin Department of Natural Resources to appoint an independent evaluator to review the nature of the contamination emanating from the WMWI-Polk Landfill, including an evaluation of all pertinent documents relating to the landfill.

22. The defendants have begun to sink piles for construction of the Ackerville Bridge.

23. The plaintiffs and the environment will suffer irreparable harm unless his court issues a temporary restraining order and preliminary injunction enjoining the defendants from driving any more pilings at the site of the Ackerville Bridge project and ordering the defendants to pump grout down the sides of the piles that have already been sunk into the soil. The pumping of grout will eliminate the permeability that has been created because of those pilings, before the contaminated plume reaches the pilings.

FIRST CAUSE OF ACTION

24. Paragraphs 1 through 23 above are hereby incorporated by reference as if set forth in full herein.

25. The defendants' issuance of the FONSI for Project 2748-01-00 was arbitrary and capricious, because they entirely failed to consider an important aspect of the problem and/or offered an explanation for their decision that runs counter to the evidence before the agencies.

26. The defendants issued the FONSI without knowing the location of the contaminant plume, its horizontal borders, the depth of the contaminant plume (i.e. the degree and extent of the contamination), or the extent to which damage to the environment, including drinking water, will occur because of the driving of the pilings.

27. It is known that the arsenic contamination is centered in the vicinity of two, two-well piezometer nests located to the immediate south of the landfill, along the north side of the railroad tracks. Each two-well piezometer nest has one well which intersects the water table and a second well which is screened about 30 feet below the water table.

28. Each pair of wells is known as a piezometer nest. The concentration of arsenic found in the lower monitoring wells is generally greater than that found in the water table wells. The vertical extent of the contaminate plume between the piezometer is not known.

29. Due to the lack of sufficient downgradient monitoring wells in the path of the arsenic contamination, the horizontal extent of the arsenic contamination is also not known.

30. The closed WMWI-Polk Landfill is the direct source for a portion of the arsenic contamination.

31. The construction of the proposed Ackerville Bridge along STH 164, which will span the railroad corridor, requires that pilings be driven into the ground to a depth of 70-80 feet, the depth of some private wells in the Ackerville area. At this time it is uncertain that the arsenic contamination found near the landfill extends, especially at depth, to the bridge area. Driving pilings into potentially contaminated groundwater could result in a short term mixing and accelerated dispersion of the contamination, thus potentially adversely affecting the water quality in Ackerville.

32. The degree and extent of the arsenic contamination must be determined before the bridge project can continue. This determination must be made before-construction of the Ackerville Bridge to protect the residents of Ackerville, some of whom are members of Citizens, from poisoning of their wells and resultant health risks and to prevent an adverse environmental impact, i.e, spread of the contamination, if the proposed bridge were to be built.

33. TCE and other chlorinated solvents have been detected within, and especially around the outer margin of the contaminated plume. The contamination was detected in quantities sufficient to warrant the replacement of two private wells with the assistance of the Wisconsin Department of Natural Resources.

34. The degree and extent of the TCE contamination has also not been determined, and must also be determined before the bridge project can continue, in order to protect the residents of Ackerville, some of whom are members of Citizens, from poisoning of their wells and resultant health risks and to prevent

an adverse environmental impact, i.e, spread of the contamination, if the proposed bridge were to be built.

35. The source of the TCE contamination is uncertain, but it appears that the TCE contamination originated from the WMWI-Polk Landfill.

SECOND CAUSE OF ACTION

36. Paragraphs 1 through 35 above are hereby incorporated by reference as if set forth in full herein.

37. Citizens has proposed reasonably feasible alternatives to the building of the proposed bridge. These reasonably feasible alternatives include, but are not limited to, installing crossing gates at the railroad tracks and installing traffic lights at the intersection of STH 164 and STH 175.

38. The defendants have failed to make a searching inquiry into the reasonably feasible alternatives that Citizens has proposed.

39. According to the revised EA and FONSI, "The main purpose and immediate need for the STH 175 to STH 60 project is to correct a safety problem at the STH 164/STH 175 intersection, correct a hazardous at-grade train crossing on STH 164 by building a bridge to cross over the train tracks and reconstruct the existing 2-lane roadway to correct a deteriorating pavement situation." The EA identifies "the need to bridge the train tracks [as]. . . the driving force behind this project." The EA states that "A secondary focus of the project is to preserve a corridor for a possible future 4- lane roadway."

40. The main purpose and immediate need referred to in the revised EA and FONSI can be met by installing crossing gates at the railroad tracks and a traffic light at the intersection of STH 164 and STH 175, integrated with the crossing gates. Citizens has also proposed other alternatives, including improving the pavement and adding shoulders at Lovers Lane.

41. The defendants have rejected these alternatives, even though they are reasonable, feasible alternatives, because of the defendants' true intent is to build the Ackerville Bridge as part of their plan to expand STH 164 from 2 to 4 lanes. According to the EA, however, the need for such an expansion "won't be needed for 25 years or more."

42. Part of the Ackerville Bridge Project is the reconstruction and alignment relocation of Lovers Lane Road immediately to the north of the bridge structure and running up to STH 60. In contemplation of a future four-lane highway (which may or may not be needed 25 years into the future), the WisDOT has purchased a right-of-way wide enough for a divided four-lane highway, is now currently relocating the first set of lanes for Lovers Lane to the east of the current alignment with the new 30 foot median strip being located along the old road alignment and the future lanes to be located to the west of the current alignment.

43. A reasonable alternative is to keep Lovers Lane on the current alignment and just improve the pavement and add shoulders, much like the way STH 164 is presently, south of the proposed Ackerville bridge project.

44. Consistent with their true intent, to realign Lovers Lane as part of their plan to expand STH 164

from 2 to 4 lanes, the defendants have rejected this alternative even though such an expansion "won't be needed for 25 years or more."

THIRD CAUSE OF ACTION

45. Paragraphs 1 through 44 above are hereby incorporated by reference as if set forth in full herein.

46. The defendants have improperly segmented Projects 2748-01-00 and 2748-01-01.

47. Although the defendants have treated the Lovers Lane Road/Ackerville Project ID #2748-01-00 as a separate project from County J/State Highway 164, Project ID #2748-01-01, they are, in fact, either one project or, if not, the Lovers Lane Road/Ackerville Project is an interdependent part of a larger action and depends on the larger action for its justification, insofar as the construction of the bridge is concerned. As two projects, the Lovers Lane/Ackerville Bridge Project and the CTH J/STH 164 projects are closely related and should be discussed in the same EIS.

48. The Lovers Lane Road/Ackerville bridge is being built in anticipation of widening STH 164 north of County E to STH 60 from two lanes to four lanes and is in fact a part of the STH 164/County J Reconstruction project. The reason that the defendants have segmented the bridge project into a separate project is so that the EIS for the project 2748-01-01 - terminating south of a point north of County E (the STH 164 hilltop at the Gindt residence) - would not have to address the environmental issues raised by the presence of the contaminate plume.

WHEREFORE, plaintiffs demand judgment against the defendants and each of them:

(1) Temporarily, preliminarily and permanently enjoining the defendant from proceeding with the Lovers Lane Road/Ackerville project 2748-01-00, including but not limited to from driving any more piles at the location of the bridge project, until they have determined the location and extent of the contaminant plume and then have prepared a full EIS.

(2) Mandatorily directing the defendants to pump grout according to good engineering practices into the holes where any pilings have presently been driven to seal the areas of disturbed soil around the piles.

(3) Requiring the defendants to perform an Environmental Impact Study for the Lovers Lane Road/Ackerville project.

(4) Requiring the defendants to prepare a Final Environmental Impact Study for all of the County J/Highway 164 project, including that portion consisting of the Lovers Lane Road/Ackerville project.

(5) Preliminarily and permanently enjoining the defendants from widening County J/Highway 164 from I-94 in Waukesha County to STH 60 in Washington County from two lanes to four lanes.

(6) Preliminarily and permanently enjoining the defendants from re-aligning Lovers Lane Road and from changing the present alignment, except to improve the pavement and add shoulders without moving the road.

Dated at Milwaukee, Wisconsin this 3rd day of July, 2002.

ROBERT B. CORRIS, S.C.
Attorneys for the Plaintiffs

By: _____
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WIS 164 County J Reconstruction Study

1/2 Mi. North of I-94 (Waukesha County) to 1/2 Mi. South of WIS 175 (Washington County)

WIS 164 (County J Study Area I-94 to WIS 175

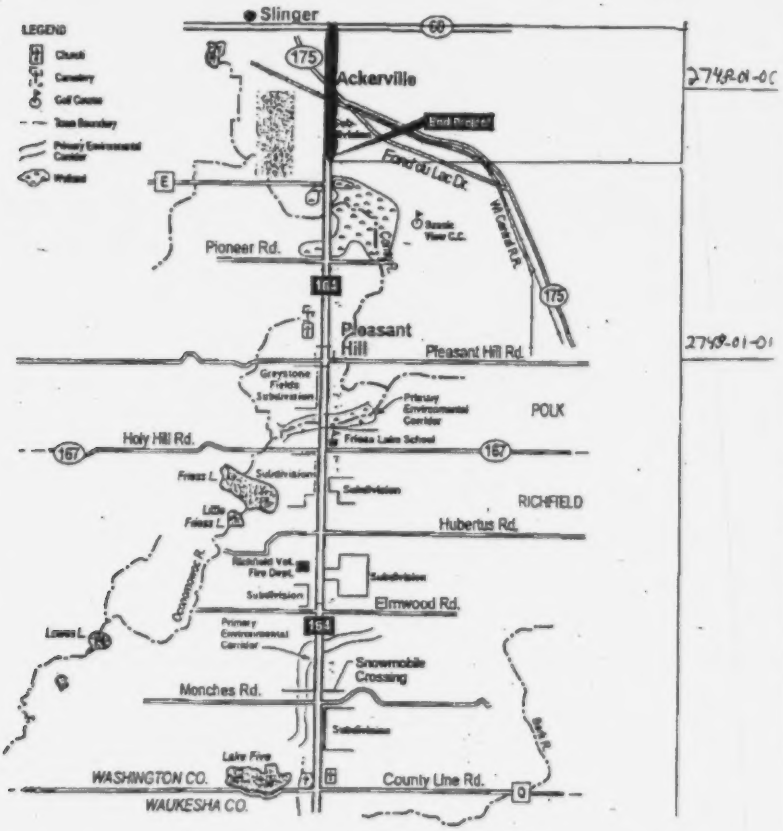


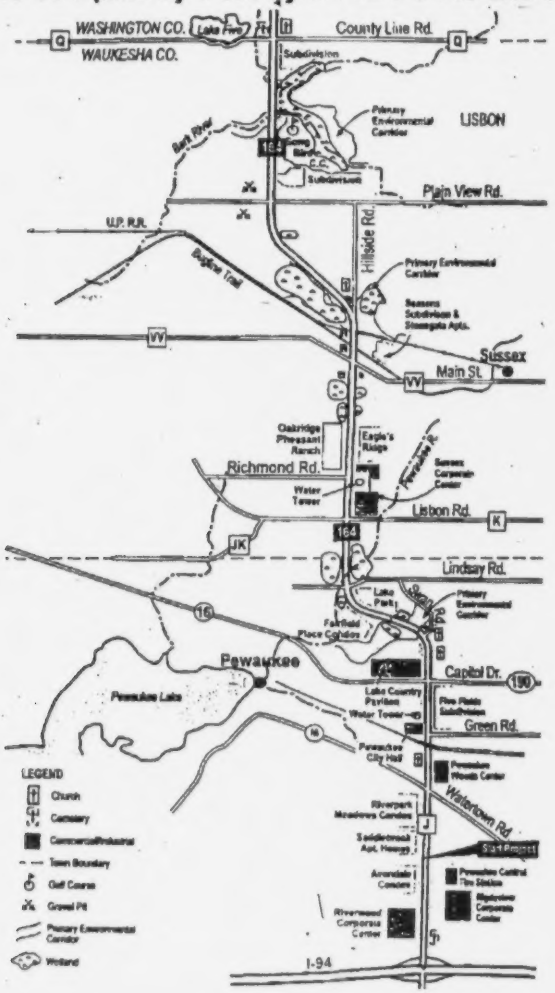
Exhibit 1

BEST AVAILABLE COPY

WIS 164 County J Reconstruction Study

1/2 Mi. North of I-94 (Waukesha County) to 1/2 Mi. South of WIS 175 (Washington County)

WIS 164 (County J Study Area I-94 to WIS 175



274-01-C1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HIGHWAY J CITIZENS GROUP, U.A., WAUKESHA COUNTY ENVIRONMENTAL ACTION LEAGUE;	)	Case No.:
Plaintiffs,	)	COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
vs.	)	
UNITED STATES DEPARTMENT OF TRANSPORTATION (USDOT); Secretary of Transportation NORMAN MINETA; FEDERAL HIGHWAY ADMINISTRATION (FHWA); Administrator of FHWA Mary Peters; US ARMY CORPS OF ENGINEERS; ACOE District Engineer Michael F. Pfenning; FRANK BUSALACCHI, in his official capacity as Secretary of the STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION;	)	
Defendants.	)	

INTRODUCTION

1. Plaintiffs Highway J Citizens Group, U.A. ("Citizens") and Waukesha County Environmental Action League ("WEAL") bring this action to challenge actions of the United States Department of Transportation ("USDOT") and of the United States Army Corps of Engineers ("COE") related to the proposed highway 164 widening project in Waukesha and Washington counties. The project widens approximately 18 miles of former County Highway J and Wisconsin Highway 164 from 2 lanes to 4 lanes, north of Interstate Highway 94, at a cost of approximately $67 million. According to the project's Environmental Impact Statement, the expansion will convert approximately 100 acres of land to highway use, including approximately 15 acres of wetland and 39 acres of farmland, and will displace 37 residences. The southernmost portion of the project, the expansion of former County Highway J to 4 lanes between I-94 and Swan Road, has already been constructed, and that highway was transferred by Waukesha County to the Wisconsin DOT and redesignated as State Highway 164.

2. Plaintiffs assert that the final actions of the USDOT, the COE, and their respective officials violate the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), the Federal-Aid Highway Act as amended by the Transportation Equity Act for the 21st Century, 23 U.S.C. §§ 101 *et seq.* ("TEA- 21"), the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* ("APA"), the Clean Water Act, 33 U.S.C. §1344, and these statutes' implementing regulations.

3. Plaintiffs assert that defendants have violated the following statutory duties:

a) the duty of the USDOT to 1) inform the public of "significant impacts on the human environment" -- including especially indirect and cumulative impacts of the project and adverse effects on human health --likely to result from this federally supported major highway expansion project, 2) perform an alternatives analysis that includes an assessment of the relative impacts on human health of the proposed highway expansion as compared with alternative transportation facilities and/or services that will avoid or mitigate the adverse health impacts of the proposed highway expansion project, and 3) adopt mitigation measures that will "eliminate or minimize" the serious harm to human health and the environment anticipated to result from approval of the proposed highway 164 widening project; and

b) the duty of the COE to 1) perform a practicable alternatives analysis to assure that adequate steps are taken to avoid and minimize wetland impacts resulting from the project, and 2) when issuing a permit authorizing the filling of wetlands, to require adequate compensatory mitigation for permitted impacts.

4. Plaintiffs challenge the adequacy of the Environmental Impact Statement ("EIS") prepared for the Secretary of Transportation by the Federal Highway Administration ("FHWA") and the Wisconsin Department of Transportation ("WisDOT") for the highway 164 widening project. Defendants failed to address certain significant environmental effects of the project, including but not limited to, the increased health risk to residents of near-by neighborhoods that

is anticipated to result from increased human exposure to pollutants emitted into the ambient air, as well as the effects attributable to increased traffic induced by the expansion project itself. In addition, Defendants used inadequate methodology to consider other effects, particularly cumulative and indirect impacts, and, as a result, performed a deficient and inaccurate analysis of the environmental consequences of the project. Defendants violated federal law by performing this incomplete analysis of environmental consequences. Defendant WisDOT also violated Wisconsin law, specifically the Wisconsin Environmental Policy Act ("WEPA"), section 1.11, Stats., and Wis Adm. Code Ch. Trans 400 et seq.

5. Defendants used this deficient and inaccurate analysis of consequences to evaluate project alternatives, and failed to consider all reasonable alternatives. As a result, defendants compared alternatives against an inaccurate assessment of the costs and benefits of the proposed project, and failed to compare alternatives with respect to their ability to "eliminate or minimize" the adverse effects of air pollution emitted from the proposed project on human health. Defendants violated federal law by performing a skewed alternatives analysis that did not meet the requirements of NEPA.

6. This action also challenges Defendants' decision not to prepare a Supplemental Environmental Impact Statement ("SEIS") to address new evidence of significant effects that became available after the close of the comment period on the Draft Environmental Impact Statement. This evidence relates to adverse health effects associated with exposure to air pollutants emitted from motor vehicles and adverse effects resulting from increased traffic that will be

generated by the expansion project. Construction and operation of the expanded highway system will have major and significant environmental effects that were not addressed by the original EIS. The agencies' failure to supplement the EIS violates federal law because important new information indicates that environmental consequences of the expansion would differ significantly from those considered in the original EIS.

7. Defendants failed to require measures that would eliminate or minimize the adverse effects of air pollution that will result from the widening project. The agencies violated federal highway law by failing to require appropriate mitigation measures.

8. Defendants also failed to hold proper public hearings. Defendants received comments from members of the public only at meetings at which these members of the public were unable to hear each other speak. Defendants violated federal highway law by holding only these inadequate meetings as a substitute for public hearings.

9. Plaintiffs seek a declaration that Defendants' actions in approving the highway 164 widening project violated NEPA and federal highway law and in issuing a permit for wetland and waterway filling violated the Clean Water Act. Plaintiffs seek an order vacating Defendants' approval of the highway 164 Widening Project, requiring Defendants to withdraw that approval and prohibiting Defendants from funding, approving or assisting in the highway 164 widening project, until such time as Defendants comply with the law, and vacating the permit issued by the Corps. Plaintiffs further seek an injunction ordering the Defendants to fully analyze all significant

impacts and reasonable alternatives and to prepare a supplemental EIS addressing significant new information related to the health risks of the project. This relief is necessary to preserve the status quo, to prevent further illegal agency action and to forestall irreparable injury to the environment and Plaintiffs' interests.

PARTIES

PLAINTIFFS

10. Plaintiff Highway J Citizens Group, U.A. ("Citizens") is a Wisconsin unincorporated association. Citizens is a citizens' group whose purpose, according to its mission statement is as follows:

> "The Highway J Citizens Group, U.A. represents residents of Waukesha and Washington County who are concerned about the potential destruction of the region along STH 164 and CTH J with a WisDOT proposed 4-lane highway (including the Ackerville Bridge Project proposal). Membership includes residents from Polk, Ackerville, Richfield, Lisbon, Sussex, Pewaukee (Village and City) and other surrounding communities. We are committed to preserving the beauty, tranquility and environment of the area and support an improved 2-lane road through our communities."

This purpose includes maintaining Highway 164 as a two-lane scenic road and maintaining the environmental resources and preserving the remaining rural character of the area. There are approximately 8,000 members of Citizens, many of whom live along, and enjoy State Highway 164 in its present state.

Defendants have officially recognized Citizens as a "party of interest" in the STH 164/CTH J Reconstruction Study (Project ID #2748-01-01). Citizens brings this action on behalf of itself and its members.

11. Plaintiff Waukesha County Environmental Action League ("WEAL") is a Wisconsin nonstock, nonprofit corporation which has been dedicated since 1978 to protecting Waukesha County's natural resources. WEAL has approximately 100 members, the overwhelming majority of whom are residents of Waukesha County, including members who live along, and enjoy Highway 164 in its present state. WEAL brings this action on behalf of itself and its members.

12. Numerous members of Plaintiffs currently live, recreate or work along the proposed highway 164 expansion corridor. Specifically, members live, recreate and work in areas where ambient air quality, land use, noise, and cancer and other health risks will be affected by the highway expansion. The EIS documents that the proposed highway expansion will result in increased traffic noise levels which approach or exceed Wisconsin's Noise Abatement Criteria and therefore warrant mitigation efforts at numerous representative locations along the corridor, including the Lake Park subdivision, Fairfields condos, Eagle Ridge subdivision, United Presbyterian Church, Spring Hill Estates subdivision, Bark River Country Meadows subdivision, St. Columba Catholic Church, and the Golden Hills subdivision. (Final EIS, Table 4-18). Due to cost, defendants rejected undertaking any measures to mitigate these noise impacts. (Id., p. 6-2)

13. Plaintiffs' members will suffer adverse health and property impacts from increased air pollution if Defendants' actions are not reversed. The highway 164 widening project will alter surrounding land use patterns, increase development, increase air pollution and raise the risk adverse health effects associated with air pollution. The interests of Plaintiffs and their members in preserving and protecting their health and the health of their children will be harmed by, among other things, increases in particulates, nitrogen oxides, volatile organic compounds, carbon monoxide and other noxious gases caused by increases in vehicular traffic on and in proximity to the project. Furthermore, air pollution produced by highway expansion and automobile-dependent sprawl development will eliminate or reduce the value of aesthetic and recreational opportunities enjoyed by members.

14. Plaintiffs' members have been injured by Defendants' failure to comply with the public participation provisions of NEPA, of federal highway law and the APA, and their implementing regulations. Defendants' actions and omissions have prevented members from the opportunity to review and comment in a meaningful manner on the information and reasoning supporting Defendants' actions.

15. The injuries to the Plaintiffs and their members are caused by the actions and omissions of Defendants and would be redressed by the relief sought in this complaint. Unless the relief sought herein is granted, the human health, financial, aesthetic, recreational, environmental and other substantial interests of Plaintiffs and their members will continue to be adversely affected and irreparably injured by

Defendants' unlawful and arbitrary actions and omissions.

DEFENDANTS

16. Defendant United States Department of Transportation ("USDOT") is the executive department of the federal government responsible for approval of highway projects.

17. Defendant Norman Mineta, Secretary of Transportation, is the head of USDOT. Secretary Mineta is responsible for the administration, operations and activities of USDOT, including the administration, operations and activities of FHWA, a subsidiary agency of USDOT. Secretary Mineta officially resides in Washington, D.C., and is sued in his official capacity only.

18. Defendants USDOT and Secretary Mineta are referred to collectively in this complaint as "USDOT."

19. Defendant Federal Highway Administration ("FHWA") is the agency within USDOT primarily responsible for highway planning and funding. FHWA, through its Wisconsin Division, was responsible with Wisconsin DOT for preparing, reviewing and approving the EIS for the proposed expansion in accordance with NEPA.

20. Defendant Mary Peters, Administrator of FHWA, is the head of FHWA. Administrator Peters is responsible for the administration, operations and activities of FHWA and its various divisions. Administrator Peters officially resides in Washington, D.C., and is sued in her official capacity only.

21. Defendants FHWA and Administrator Peters are referred to collectively in this complaint as "FHWA."

22. Defendant United States Army Corps of Engineers ("COE") is a federal agency. Its decisions on programs and projects are subject to the NEPA, CWA, and the APA, including decisions and actions that adversely impact waters of the United States including wetlands.

23. Defendant Michael F. Pfenning ("Pfenning") is District Engineer of the St. Paul District of the COE. In this capacity, he has an affirmative responsibility, among other things, to ensure that COE actions comply with NEPA, CWA, and the APA. Defendant Pfenning issued the COE permit for the Highway 164 widening project. Defendant Pfenning is being sued in his official capacity only.

24. Defendant Frank Busalacchi is Secretary of the Wisconsin Department of Transportation, which is the agency within the State of Wisconsin primarily responsible for highway planning, funding and construction. Defendant Bussalachi is sued in his official capacity only.

JURISDICTION AND VENUE

25. This court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), and 5 U.S.C. § 702 (APA). Pendent jurisdiction also exists under 28 U.S.C. § 1367 for claims based on violation of the Wisconsin Environmental Policy Act ("WEPA"), see sec. 1.11, Stats.; see Wis. Adm. Code Ch. TRANS 400 et seq.

WEPA imposes upon Wisconsin state agencies substantively identical requirements as NEPA does upon federal agencies.

26. Venue in this judicial district is proper, pursuant to 28 U.S.C. § 1391.

27. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a). This Court may grant declaratory relief and additional relief as authorized by 28 U.S.C. §§ 2201 and 2202.

STATUTORY AND REGULATORY FRAMEWORK THE NATIONAL ENVIRONMENTAL POLICY ACT

Requirements for Evaluation of Environmental Consequences

28. NEPA requires federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(A) (1994). Regulations promulgated by the Council on Environmental Quality to govern the criteria and procedures to be applied by federal agencies when they review proposed projects under NEPA require agencies to "insure the professional integrity, including scientific integrity, of the discussion and analyses in environmental impact statements." 40 C.F.R. § 1502.24. Agencies must make a good faith inquiry into the environmental consequences of proposed actions, and are required to use the best available science to support their conclusions. *See Environmental Defense Fund v. Hardin,* 325 F. Supp. 1401, 1403 (D.D.C. 1971).

Accordingly, agencies may not selectively ignore consequences or use discredited science.

Requirements for the Evaluation of Indirect and Cumulative Impacts

29. As part of the analysis of the environmental impacts of the highway 164 expansion project, Defendants must take a "hard look" at the indirect or growth-inducing effects of the Expansion Project, 40 C.F.R. § 1508.8(b), and the cumulative impacts of the expansion project in combination with "past, present, and reasonably foreseeable future" actions in the area. 40 C.F.R. § 1508.7. In analyzing a highway project such as the one at issue in this proceeding, an agency cannot simply state that development will occur with or without the project, but instead must actually analyze the possible growth-inducing effects of a proposed highway project. *See Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002); *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994); *Citizens Advocate Team*, 2004 U.S. Dist. LEXIS at *15; *Wilds v. Slater*, 2000 U.S. Dist. LEXIS 20771, at *26 (D.S.C. 2000).

Requirements for the Evaluation of Alternatives

30. The analysis of environmental consequences provides the basis for "the heart of the environmental impact statement": the evaluation of alternatives. 40 C.F.R. §§ 1502.14, 1502.16. Using the information on environmental consequences, an EIS must "rigorously explore and objectively evaluate all reasonable alternatives" and . . . [d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparable

merits." 40 C.F.R. § 1502.14(a). This analysis will be irreparably skewed by a failure to adequately consider either reasonable alternatives or the consequences of the proposed action.

Supplemental Environmental Impact Statement Requirements

31. NEPA requires federal agencies to consider the environmental impacts of their actions. 42 U.S.C. § 1332 (1994). This requirement includes the obligation to assess new information made available after the completion of an Environmental Impact Statement. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). If new information indicates that circumstances differ significantly from those contemplated when the original EIS was prepared, the agency must prepare an SEIS. *See id.* at 372.

FEDERAL HIGHWAY LAW

Requirements to Consider and Mitigate Adverse Effects

32. Federal highway law requires consideration of the adverse effects of air pollution prior to approval of the plans and specifications for a highway. 23 U.S.C. § 109(a); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1242 (D.C. Cir. 1972). In addition, USDOT must determine the costs of eliminating or minimizing the adverse health effects attributable to air pollution and require mitigation in the "best overall public interest." 23 U.S.C. § 109(h). Under USDOT's regulations, the analyses required by section 109(a) and (h) are to be performed as part of the NEPA review of the project. 23 C.F.R. pt. 771. Those

regulations also include a requirement that measures necessary to mitigate adverse impacts be incorporated into the project. 23 C.F.R. § 771.105.

Public Hearing Requirements

33. Under federal law, the DOT was required to hold public hearings on the EIS. *See* 23 U.S.C. § 128(a) (1994), 23 C.F.R. § 777.111(h). The public hearing provides a means for informing the public about a proposed project. The hearing, however, must be "more than a public presentation by the highway department of its plans and decisions." *Coalition of Concerned Citizens Against I-670 v. Damien*, 608 F.Supp. 110, 124 (S.D. Ohio 1984). Instead the hearing must serve as a forum for the agency to "be directly and publicly confronted with opposing views" on the project so that the agency can make the best decision. D.C. *Federation of Civic Ass'ns. v. Volpe*, 434 F.2d 436, 441 (D.C. Cir. 1970). Federal courts, citing the legislative history of the Federal-Aid Highway Act, have suggested that a public hearing is "meant to be a town-hall type meeting" so that agency officials are publicly confronted with any opposing views. *Damien, supra*, 608 F.Supp. at 124; see also *Lathan v. Brinegar*, 506 F.2d 677, 691 (9th Cir. 1974); *City of South Pasadena v. Slater*, 56 F.Supp.2d 1106, 1132 (S.D. Cal. 1999) (noting that "the plaintiffs have raised serious questions about whether the format of an open house is the equivalent of a public hearing.")

CLEAN WATER ACT

34. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, requires the COE to review permit applications for proposals to fill wetlands under the standards set forth in 33 C.F.R. § 320.1(a)(4) and 40

C.F.R. Part 230. Among other things, the regulations prohibit the granting of permits in any situation in which there exists a "practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem," and would not have any other "significant adverse environmental consequences." 40 C.F.R. § 230.10(a)(2) defines "practicable alternative" as an alternative that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."

ADMINISTRATIVE PROCEDURES ACT

35. The APA, 5 U.S.C. §§551 *et seq.*, requires that federal agency actions and decisions follow all statutorily prescribed procedures and comply with all applicable laws. The APA also requires that a reviewing court hold unlawful and set aside any agency action if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

36. The APA authorizes federal courts to enjoin agency activity if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

FACTUAL CHRONOLOGY

37. In 1985, using 75% federal funding and 25% local (County) funding, Waukesha County reconstructed a local trunk highway (originally designated County Highway F, and later renamed County Highway J) between Capitol Drive and Lindsay

Road. This work, identified as Project 2780-01-76, involved the filling of as much as 7.5 acres of wetlands north of Swan Road, but was conducted without the permit required from the COE under Section 404 of the Clean Water Act. In 1986, the COE sent Waukesha County the paperwork for an "after the fact" permit to sign and submit, but Waukesha County refused to sign and submit it. Subsequently, that section of highway was transferred to the WisDOT and is now designated Highway 164. To date, no permit has ever been issued for the wetland filling, nor have WisDOT or the COE taken steps to remedy, to mitigate, or to require compensatory wetland restoration for this illegal wetland destruction. The current highway 164 expansion project will widen this section of the highway and result in filling of additional areas of the wetlands which were illegally filled in 1985.

38. County J/Wis 164, all of which is now designated highway 164, is a principal arterial highway serving both local traffic in the City of Pewaukee, Villages of Pewaukee and Sussex, and the Towns of Lisbon, Richfield and Polk, as well as through traffic between I-94 and US 41. 39. In 1999, WisDOT announced that it was studying alternatives for providing additional highway capacity in 18 miles of the County J/Wis 164 corridor north of I-94. A Draft Environmental Impact Statement was prepared by WisDOT in consultation with FHWA, dated April 9, 2001.

(Paragraph 39 at App 243)

40. Following publication of the DEIS, a public hearing was held in the project corridor on May 30, 2001. Two formats were available for providing testimony – individual oral presentations to a court

reporter, outside the hearing of others, and written comment forms for submission at the hearing or to be mailed in later. These formats failed to provide a public forum for discussion of the EIS. Members of the public were not allowed to hear each other address WisDOT officials. Nor could they be heard by State or federal agency officials in the room. Neither WisDOT nor Defendants held any other meetings that could be described as hearings regarding the EIS.

41. A Final Environmental Impact Statement dated December 11, 2001 was issued by the FHWA and WisDOT. The recommended alternative selected by the WisDOT widens Highway 164 to 4 lanes on its present alignment, incorporating the existing roadway as part of the ultimate 4-lane facility. The FEIS notes at page vii: "It did not receive as much public support during the public comment period as did the 2-lane improvement alternative." This statement was misleading, in that the recommended alternative received almost no support from the public, compared to overwhelming support for the 2-lane improvement alternative. Moreover, in tabulating those "for" and "against" the recommended alternative, Defendants mischaracterized the views of numerous members of the public, whose comments expressed unhappiness with or disapproval of expanding the highway, but were counted as "for" the recommended alternative.

42. According to the EIS, 17 residential subdivisions and apartment developments, with 1288 lots or units, are adjacent to Highway 164, from Swan Road in Pewaukee (Waukesha County) north to the expansion project's northern terminus in the Town of Polk (Washington County). However, there were also numerous additional subdivisions or apartment developments already in existence, and some under

construction along the highway, at the time the EIS was issued. One school, Friess Lake Elementary School, with a current enrollment of 324 students, is adjacent to the highway at its intersection with WIS 167. Another school, St. Gabriel's, is currently under construction along Highway 164 in the Town of Richfield just south of the Hubertus Road intersection. North of Swan Road, five churches are adjacent to Highway 164. Numerous additional residences are located within close proximity to the highway.

43. The Mike Spinks' Saloon, which was constructed between 1854 and 1856, is located on the corner of county highway K (formerly Lisbon Road) and highway 164 in the Town of Lisbon (Waukesha County). An application for inclusion of this structure in the National Underground Railroad Network to Freedom has been submitted to the National Park Service, since it is believed that the Saloon served as an underground railroad station for escaped slaves making their way to Canada before the Civil War. The property has been acquired by WisDOT as part of the highway 164 expansion project, and the structure is scheduled for imminent demolition as part of the scheduled 2005 highway expansion work.

The December 2001 EIS

44. In December 2001, the defendants issued a final EIS.

45. The EIS contained an inadequate analysis of environmental impacts and project alternatives.

<u>Inaccurate Wetland Impacts</u>

46. According to the EIS, the highway 164 expansion project will impact approximately 15 acres of wetlands. (Final EIS, pp 4-37, 4-38). This information is seriously inaccurate, in that it understates the actual impacted wetland acreage. For example, while the EIS describes 5.25 acres of impacts to wetlands W-6 through W-16, WisDOT has applied for and recently received a permit from the COE for the filing of 9.27 acres of wetlands, for the corresponding 3.8 miles of the highway from Swan Road to Prospect Court in Waukesha County. This represents an increase of approximately 77% over the wetland impacts described in the EIS for that portion of the project.

Indirect Effects/Cumulative Impacts

Indirect Effects

47. The EIS inadequately considered indirect effects of the highway 164 expansion project.

48. The only discussion of indirect effects in the EIS related to a mail-in survey to affected municipalities regarding land use issues and the consistency of the Expansion Project with existing land use plans. Based only on the survey results, WisDOT concluded that neither the current two-lane highway nor the four-lane Expansion Project would significantly impact land use in the area. Specifically, WisDOT stated that expanding Highway 164 to four lanes would "not substantially influence the type, intensity, or location of development over what is already planned for or expected to occur." (Final EIS at 4-8). WisDOT also claimed that "there is no reason to expect that maintaining" the highway as a *two-lane highway* "would influence the rate or pattern of land use change in the study area." (Final EIS at 9-9)

49. The Defendants had received numerous comments that the project would cause increased development beyond the level of development already expected in the area. Moreover, the actual municipal survey results contradicted WisDOT's offhanded conclusion that the Expansion Project would not cause indirect effects. In fact, the survey answers reflected strong disagreement over whether the Expansion Project would impact the amount and type of development in the area, with two out of the four responding municipalities stating that the four-lane highway would increase the intensity of commercial development, would lead to an increase in urban services to new development beyond that envisioned in land use plans, and would reduce green space. (Final EIS at 4-4, 4-5). In addition, at least one of the four municipalities predicted that the Expansion Project would cause more residential development, development along local roads that connect to Highway 164, and/or the conversion of farmland to other uses. (*Id.*) Three of the municipalities predicted that the Expansion Project would cause increased air and noise pollution, reduction in the sense of community, impacts on pedestrian use of the area, and increased storm water runoff. (Final EIS at 4-6). One municipality noted that the No-Build Alternative (maintaining Highway J as a two-lane road) was likely to lead to "more compact development in keeping with small town character." (Final EIS at 4-5).

50. As noted above, the portion of highway 164 between I-94 and Swan Road has already been expanded to 4 lanes. The character of the surrounding land could fairly be described as suburban sprawl, as much of it is now developed into office parks, strip shopping developments, and residential developments.

North of Swan Road, where the highway presently remains at 2 lanes, the character of the surrounding land is basically rural, with the open countryside dotted here and there with subdivision or apartment developments adjacent to the highway, and with commercial development largely limited to significant intersections, or to the municipalities through which the highway passes on its way through Waukesha and Washington Counties. Plaintiffs and plaintiffs' members share the local municipalities' belief that expanding the remaining portions of highway 164 to 4 lanes will dramatically hasten the conversion of this countryside into more suburban sprawl.

Cumulative Impacts

51. The EIS inadequately discussed the cumulative impacts of the highway 164 expansion project, together with other past, present, and reasonably foreseeable future actions.

52. NEPA requires a careful analysis of the cumulative environmental impacts of the Expansion Project. Cumulative impacts are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. 1508.7. The purpose of the cumulative impacts requirement is to ensure that an agency provides a "realistic evaluation of the total impacts" of its activities by analyzing the impacts of individual projects together rather than "in a vacuum." See *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).

53. The only discussion of cumulative impacts in the EIS consists primarily of a summary of the impact of past and projected future impacts of development in general on various environmental resources. The EIS provides data from local and regional land use plans regarding the loss of wetlands, surface waters, agricultural lands, and wooded areas due to past development in the area. (Final EIS at 4-9 to 4-13). The EIS then provides some general statements that such resources will continue to be impacted by development in the future. (*Id.*) Nowhere does the EIS either identify or analyze the present or future cumulative impacts of the Expansion Project in combination with other projects.

Induced Growth/Induced Travel

54. The EIS did not adequately consider information submitted by plaintiffs and by others indicating that adding highway lanes induces additional development which then causes additional traffic.

55. In addition, the EIS failed to adequately consider information submitted by plaintiffs and by others indicating that adding highway lanes itself induces additional travel. Induced travel is travel that occurs because of increased highway capacity that would not occur in the absence of such expanded capacity. The phenomenon is linked to the relationship between the willingness of drivers to travel longer distances when increased capacity reduces travel time.

56. The EIS failed to consider that induced growth and induced traffic would limit the project's ability to serve its ostensible purposes of improving safety and mobility and decreasing congestion. The EIS

also failed to analyze whether increased roadway capacity would induce additional highway use, and result in increased environmental impacts, including additional noise and air pollution.

57. Instead, the EIS assumed "that traffic volumes [under the Build and No-Build alternatives] would be similar enough to be unable to differentiate the pollution levels and health effects of each." (Final EIS at 9-11). The EIS provided no analysis of the induced travel phenomenon, or of the impacts generated by the increased travel demand that the project will generate.

Consideration of Alternatives

58. The EIS failed to adequately consider and improperly rejected the improved 2-lane alternative (improved 2-lane highway with center turn lane where appropriate), an alternative which would have minimized environmental impacts, including impacts to wetlands.

59. Comments were submitted to defendants in response to the Draft EIS requesting that serious consideration be given to constructing an improved 2-lane highway 164 and extending "Old Highway 164", which lies approximately one mile to the east and was already widened to 4 lanes, to connect with US Highways 41-45 by widening portions of Highways 74 and Y. This would provide a shorter and less environmentally destructive alternate route for through traffic and truck traffic seeking to avoid Milwaukee area highway congestion. In particular, the significant impacts to wetland resources caused by the widening of highway 164 would be avoided. However, the defendants did not model the effects on traffic

volumes of this alternative, and eliminated it from any serious consideration in the EIS on the basis of 4 conclusory sentences. (Final EIS, p. 2- 15). Defendants also failed to consider the "power line" alternative, another approach to extending "Old Highway 164" instead of widening Highway J/164.

60. Maintenance of highway 164 as an improved 2-lane highway, with lower speed limits, would be consistent with the land use and smart growth plans of local municipalities, and with the comments and responses of numerous local officials and safety/law enforcement personnel.

Air Quality

61. The EIS failed to address adverse health effects resulting from the likely increase in traffic which will result from doubling Highway 164 from 2 lanes to 4, and the resulting increase in air pollution in the highway corridor.

62. Comments had been submitted in response to the Draft EIS describing the harmful health effects caused by carbon monoxide, nitrogen oxide, ozone, particulate matter, and other pollutants emitted by car and truck traffic. Comments also described the need to evaluate the health effects resulting from air pollution emitted from induced growth in traffic resulting from the highway expansion.

63. Waukesha County and Washington County are designated "nonattainment" for the pollutant "ozone" pursuant to the Clean Air Act. An analysis should have been performed as part of the EIS to determine the total emissions resulting from the approximately 60% increase in traffic projected by

defendants for the corridor by 2025, together with emissions from the additional traffic induced by a doubling of highway 164's travel lanes (which defendants wrongly assumed to be zero). Such a cumulative analysis was not performed.

64. The FEIS concludes in Section 4, under "Air Quality", that providing additional capacity on County J /WIS 164 meets the requirements of the Clean Air Act, which is intended to protect human health. However, without identifying traffic volumes which would result from "induced demand", it is not possible to determine if the requirements of the Clean Air Act will be met.

65. Moreover, the EIS includes no discussion, description, or analysis of the health impacts of air pollutants from increased volumes of traffic on the people who live or work in the highway corridor.

Failure to Assess Risk from Hazardous Air Pollutants

66. The U.S. Environmental Protection Agency ("EPA") has published a list of "Mobile Source Air Toxics (MSAT)," which categorized diesel particulate matter and diesel exhaust organic gases as "hazardous air pollutants" under the Clean Air Act. 66 Fed. Reg. 17,229 (March 29, 2001).

67. Expansion of highway 164 from 2 lanes to 4 lanes will significantly increase the volume of truck traffic in the highway corridor, which will result in increased emission of diesel exhaust.

68. The Defendants did not prepare an EIS or SEIS to investigate, estimate or consider whether expanded highway capacity and increased motor

vehicle travel in the corridor would increase emissions of hazardous air pollutants into the ambient air.

69. The Defendants did not prepare an EIS or SEIS to investigate, estimate or consider whether the increased motor vehicle travel in the corridor would contribute to higher concentrations of hazardous air pollutants in the ambient air in near-by neighborhoods and to increased human exposure to such pollutants.

70. The Defendants did not prepare an EIS or SEIS to investigate, estimate or consider whether health risks among residents in the surrounding community would likely be increased as a result of increased emissions of hazardous air pollutants into the ambient air.

71. The Defendants did not prepare an EIS or SEIS to investigate, evaluate or consider evidence submitted by plaintiffs and by others showing that emissions of hazardous air pollutants into the ambient air would be expected to increase as a result of increased vehicle travel in the corridor, that such emissions would be expected to cause significantly increased exposure to hazardous air pollutants by residents living in the project corridor, and that such increased exposure is expected to increase the health risks among exposed populations.

72. The Defendants did not identify mitigation measures that might be available for implementation in the corridor to eliminate or minimize human exposure to toxic air pollutants and health risks associated with emissions from motor vehicles in the highway 164 corridor.

The March 6, 2002 Record of Decision

73. Based on the December 2001 FEIS, USDOT and FHWA issued a Record of Decision on March 6, 2002, approving the FEIS and its recommended 4-lane highway 164 expansion alternative.

The US Army Corps of Engineers Permit

74. In granting WisDOT its permit for filling wetlands for the expansion of highway 164, Defendant COE failed to consider the availability of a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, and would not have any other significant adverse environmental consequences. Specifically, COE failed to consider an improved 2-lane highway 164, together with connecting "Old Highway 164" to US Highways 41-45 via widened Highways 74 and Y, an alternative which had been improperly rejected from consideration in the EIS.

75. Moreover, the COE's evaluation of the adverse impact on the aquatic ecosystem of the proposed highway 164 expansion project was skewed by the erroneous description of wetland impacts set forth in the EIS, which seriously understates the magnitude of those impacts, and therefore of their resulting direct and indirect environmental consequences.

Post-ROD Changes

76. Although improving the safety of highway 164 was one of the stated purposes of the expansion project, according to the EIS, in October 2003, WisDOT held a public information meeting to announce that three overpasses which had been included in the selected alternative, as presented in the EIS and approved in the ROD, would be replaced by at-grade crossings or intersections. Specifically, overpasses which would have separated traffic on highway 164 by carrying it above intersecting traffic were eliminated at the following locations, all in the stretch of highway 164 between highway VV and Howard Lane, west of Sussex in Waukesha County: 1) the intersection of highway 164 with Stonegate Court; 2) the intersection with the Union Pacific Railroad tracks; and 3) the intersection with Indiangrass Lane. Elimination of these overpasses reduces the safety improvements which were to be accomplished by the project, and increases a number of the environmental impacts on surrounding residents and resources.

CAUSES OF ACTION

77. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 76 above in all of the Causes of Action set forth below.

FIRST CAUSE OF ACTION
VIOLATION OF NEPA AND APA
INADEQUATE IMPACTS ANALYSIS

78. Defendants failed to prepare an environmental impact statement in compliance with the requirements of NEPA. The EIS did not adequately identify, disclose, and study the direct, indirect and cumulative impacts of the Project on the natural and human environment.

79. Impacts not adequately identified, disclosed, and/or studied include, but are not limited to:

a. increased conversion of open lands to developed uses as a result of development of the proposed project;

b. effects of increased travel demand, including but not limited to increased motor vehicle trips, increased emissions of air pollutants from motor vehicles, and increased traffic congestion, likely to result from the proposed project;

c. adverse impacts on human health in communities within the corridor likely to result from increased motor vehicle travel expected in the corridor if the proposed project is built;

d. cumulative impacts resulting from this project together with other past, present, and reasonably to be expected projects.

80. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet NEPA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

SECOND CAUSE OF ACTION
VIOLATION OF NEPA AND APA
RELIANCE ON INACCURATE INFORMATION

81. The EIS violates NEPA because it relies on inaccurate, unreliable or unexplained data in determining the environmental impacts of the proposed project. Specifically, the EIS used outdated and inaccurate data on wetland impacts, which understated the acreage of wetlands to be filled if the highway was widened.

82. As a result, both the direct wetland impacts, as well as the indirect impacts, including flooding impacts to neighboring residents, were understated.

83. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet NEPA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

THIRD CAUSE OF ACTION
VIOLATION OF NEPA AND APA
INADEQUATE ALTERNATIVES ANALYSIS

84. The analysis of alternatives in the EIS violates NEPA because it failed to consider adequately all reasonable alternatives.

85. Defendants failed to adequately consider and improperly rejected the improved 2-lane highway and "expanded Old Highway 164" alternative. Defendants' rationale for rejecting this alternative was conclusory. The EIS assessment of alternatives failed to consider the induced growth and induced travel which would result from expanding highway 164 to 4 lanes and by failing to consider the resulting increase in air pollution and its adverse health effects

86. By using an incomplete analysis of the environmental impacts of the project, and by underestimating the potential benefits of alternatives, defendants seriously and unjustifiably skewed the analysis of alternatives. Defendants weighed alternatives to the proposed project against an unrealistically optimistic assessment of project benefits and shortcomings.

87. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet NEPA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

FOURTH CAUSE OF ACTION
VIOLATION OF NEPA AND APA
INADEQUATE RESPONSES TO COMMENTS

88. The failure of the agency to adequately respond to significant comments is a violation of NEPA.

89. Concerns that the proposed project would not meet the specific project goals were not adequately addressed.

90. The EIS provided an inadequate response to the comments regarding induced demand and public health risks.

91. The Defendants failed to respond in a public EIS process to the comments and letters raising concerns about public health risks created by the project.

92. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet NEPA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

FIFTH CAUSE OF ACTION
VIOLATION OF NEPA AND APA
FAILURE TO PREPARE A SUPPLEMENTAL EIS

93. NEPA requires the preparation of an SEIS when new information allows a significantly changed understanding of the environmental impacts of a project. New information indicates that the highway 164 expansion project will have significantly greater impacts on aquatic resources, specifically wetlands, than described in the original EIS.

94. Moreover, new information that has become available during and after preparation of the EIS demonstrates the existence of impacts on travel demand, total vehicle trips, motor vehicle emissions, and health risks not contemplated by the defendants in the original EIS, but a supplemental EIS addressing these impacts was not prepared.

95. New information indicates that the project will induce travel. This induced travel will create significantly greater noise and air quality impacts, and will alter land use. The original EIS did not address the air quality, noise, and land use effects of induced travel demand. The defendants violated NEPA by failing to prepare a supplemental EIS to address these impacts.

96. New information indicates that the increased daily vehicle trips associated with the expanded highway capacity that will result from implementation of projects like the proposed action contribute to increased emissions of toxic air pollutants, increased human exposure to such pollutants, and increased risk of adverse health effects. The original EIS did not contemplate the health risks created by the proposed expansion. The defendants violated NEPA by failing to prepare a supplemental EIS to address new evidence of heightened health risks.

97. The Post-ROD changes to the selected alternative, including the removal of three approved overpasses and their replacement with at-grade crossings, represent significant changes to the safety characteristics and environmental impacts of the highway expansion. These changes have not been addressed in a supplemental EIS.

98. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet NEPA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

SIXTH CAUSE OF ACTION
VIOLATION OF FEDERAL HIGHWAY STATUTES AND REGULATIONS -- FAILURE TO CONSIDER AND MITIGATE ADVERSE EFFECTS OF AIR POLLUTION

99. Federal highway law requires consideration of the adverse effects of air pollution prior to approval of a new highway project. 23 U.S.C. § 109(a) and (h). These effects must be considered as part of the NEPA review of the project. Defendants failed to adequately consider the adverse effects of hazardous air pollution resulting from the project.

100. Defendants must determine the costs of eliminating or minimizing the adverse health effects attributable to air pollution and require mitigation. 23 U.S.C. § 109(h). Measures necessary to mitigate adverse impacts must be incorporated into the project. 23 C.F.R. § 771.105. The defendants violated these requirements by failing to evaluate and incorporate measures that would minimize or eliminate human exposure to hazardous air pollutants resulting from the project.

101. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet FHWA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

SEVENTH CAUSE OF ACTION
VIOLATION OF FEDERAL HIGHWAY STATUTES AND REGULATIONS
FAILURE TO HOLD PUBLIC HEARINGS

102. Federal highway law and regulations require that public hearings be held to address the environmental impacts of proposed projects. Defendants violated these requirements by holding only meetings that did not allow the public to hear and be heard.

103. For the reasons stated above, the approval of the highway 164 expansion project by USDOT and FHWA failed to meet FHWA statutory and procedural requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

EIGHTH CAUSE OF ACTION
VIOLATION OF CLEAN WATER ACT

104. Defendant COE issued a permit to Defendant WisDOT without adequate consideration of an available practicable alternative which would have less adverse impact on the aquatic ecosystem and would not have any other significant adverse environmental consequences.

105. Defendant COE's review of the permit application was based on inaccurate information in the EIS regarding wetland impacts of the proposed highway 164 expansion project.

106. For the reasons stated above, the issuance by COE of its permit to WisDOT for wetland filling related to the expansion of 3.8 miles of highway

164 north of Swan Road failed to meet Clean Water Act statutory and regulatory requirements and was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Highway J Citizen Group, U.A. and Waukesha County Environmental Action League respectfully request that this Court grant the following relief:

A. An order declaring that:

(i). the EIS and Record Of Decision ("ROD") do not comply with NEPA and WEPA because:

1. the EIS did not adequately identify, disclose, and study the direct, indirect, and cumulative impacts of the project on the natural and human environment;

2. the EIS relied on inaccurate, unreliable or unexplained data in determining the environmental impacts of the project;

3. the EIS failed to consider adequately all reasonable alternatives;

4. the Defendants failed to adequately respond to significant comments;

(ii). Defendants' failure to prepare an SEIS to consider significant new information violates NEPA and WEPA;

(iii). Defendants USDOT and FHWA failure to consider and mitigate the adverse effects of air pollution violates federal highway law;

(iv). Defendants USDOT and FHWA's failure to hold adequate public hearings violates federal highway law; and

(v). Defendant COE's issuance of a permit for wetland filling to WisDOT for work on expansion of 3.8 miles of Highway 164 north of Swan Road violates the Clean Water Act.

B. Temporary restraining orders and preliminary and permanent injunctions:

(i) vacating FHWA issuance of the final EIS and approval of the Record of Decision for the project;

(ii) vacating COE issuance of the Clean Water Act Section 404 permit for the project;

(iii) vacating or staying the effectiveness of any project agreement authorizing the use of federal funds for the highway 164 expansion project executed with the State of Wisconsin pursuant to 23 U.S.C. § 106(a);

(iv) ordering Defendants USDOT and FHWA to comply fully with the requirements of NEPA, the APA, and federal highway law prior to the execution of any agreement

authorizing the expenditure of federal funds for the highway 164 expansion project pursuant to 23 U.S.C. § 106(a);

(v) requiring Defendants USDOT and FHWA to prepare an SEIS that adequately analyzes all impacts of the proposed project and all reasonable alternatives using the most reliable information and the best available techniques for estimating the impacts of the proposal and reasonable alternatives. Such analyses shall include, but not be limited to,

(I) reliable estimates of future vehicle trips in the highway 164 corridor, considering the effect that implementation of the project will likely have on travel demand and increased vehicle use;

(II) accurate and meaningful discussion of the impact of project implementation on changes to land use in the corridor, taking into account the comments and responses of affected municipalities;

(III) the effect that increased vehicle travel in the corridor will likely have on emissions of air pollutants from motor vehicles in the corridor, including emissions from motor vehicles of hazardous air pollutants listed by EPA pursuant

to § 202(l)(2) of the Clean Air Act, 66 Fed. Reg. 17229 March 29, 2001);

(IV) expected concentrations of such hazardous air pollutants in areas where human exposure will occur in the corridor;

(IV) estimates of the risk of adverse health effects, including cancer and other effects attributed to air pollutants from motor vehicles, among exposed populations in the corridor;

(vi) requiring Defendants USDOT and FHWA to identify mitigation measures that may eliminate or minimize the adverse effects of air pollutants emitted from motor vehicles in the corridor pursuant to 23 U.S.C. § 109(h), including reasonable alternatives to the project that may reduce travel demand, vehicle use, motor vehicle emissions and adverse health effects in the corridor;

(vii) prohibiting Defendants USDOT and FHWA from taking any other action that in any way supports or funds the design, property acquisition, construction or development of the project until Defendants have remedied their violations of NEPA, the APA, and federal highway law;

(viii) prohibiting Defendant Busalacchi from taking any other action that in any way supports or funds the design, property acquisition, construction or development of the project until Defendants have remedied their violations of WEPA and NEPA

(ix) requiring Defendants USDOT and FHWA to order WisDOT to stop all funding, design, property acquisition, or construction of the project until Defendants have remedied their violations of NEPA, the APA, and federal highway law, and to preserve funds allocated for new facilities in the highway 164 corridor until a final selection among alternatives is made.

C. An award to Plaintiffs of their reasonable attorneys fees, costs, expenses and disbursements associated with this litigation;

D. Such additional relief, including temporary restraining orders and preliminary and permanent injunctions, and any other appropriate relief as this Court may deem just and proper.

DATED this 22nd day of February, 2005.

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ATTORNEYS FOR PLAINTIFFS

39. In 1999 WisDOT announced that it was studying alternatives for providing additional highway capacity in 18 miles of the County J/Wis 164 corridor north of I-94. A Draft Environmental Impact Statement was prepared by WisDOT in consultation with FHWA, dated April 9, 2001

Map of
ACKERVILLE BRIDGE/LOVERS LANE ROAD PROJECT
From Page 1-2 of County Highway J/WIS 164
Final Environmental Impact Statement